TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 268

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, PETITIONER

vs.

JACOB F. OTTMULLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED AUGUST 7, 1936

CERTIORARI GRANTED OCTOBER 12, 1936

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1 [Caption omitted.]

In Supreme Court of the District of Columbia, holding an equity court

Equity No. 57740

JACOB F. OTTMULLER, PLAINTIFF

vs.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, DEFENDANT

Bill of complaint

Filed September 24, 1934

To the honorable Supreme Court of the District of Columbia, holding an equity court:

The plaintiff respectfully represents that he is a citizen of the United States and of the State of Washington, residing near Mabton, in Yakima County, Washington, and that his post-office address is Mabton, Washington, and that he brings this suit in his own right and in his own behalf against Harold L. Ickes, a citizen of the State of Illinois, residing in the District of Columbia in respect of the matters and things hereinafter set forth.

I

That the plaintiff is an unmarried man and the sole owner and in possession of the following-described real estate located within the Sunnyside unit of the Yakima project, to wit: The southwest quarter of the southeast quarter of section 31, township 9 north, range 23 E., W. M., being lots one to eighteen in block one East Park Addition to Mabton, and that there is appurtenant to said land a water right for a sufficient amount of water to beneficially and successfully irrigate the same from the natural flow of the Yakima River and storage reservoirs hereinafter mentioned, constructed under and by virtue of the Reclamation Act herein referred to, and the right to have

2 said water stored and impounded in the reservoirs herein described and carried in said river and in the canals and distribution system of the Sunnyside unit of the Yakima project to said land; that the amount of the water so appurtenant to plaintiff's land is in excess of five and one-half acre-feet per acre per annum, measured at the land during the irrigation season and the absolute title to said water right and said easement vests in the plaintiff and said water right and easement are real estate.

II

That the defendant is now and has been since, to wit: March 5th, 1933, the duly appointed, qualified, and acting Secretary of the

Interior of the United States, and as such has charge of the administration of the laws of the United States relating to irrigation and reclamation projects constructed by the United States, and particularly of the administration of the act of Congress known as the Reclamation Act, being the act of June 17th, 1902 (32 Stat. 388), as amended and supplemented by later acts of Congress, and that said defendant is sued in his official capacity as such Secretary of the Interior as hereinafter set forth.

III

That in 1906, the then Secretary of the Interior approved an irrigation and reclamation project known as the Sunnyside unit of the Yakima project, which included the land herein described and on behalf of the United States of America purchased from the Washington Irrigation Company, the Sunnyside Canal, water appropriations, and irrigation system used in connection therewith; that thereafter and on March 2nd, 1909, the then Secretary of the Interior, by public notice and order, fixed the price to be charged each irrigable acre of the lands herein described and other lands in private ownership, at the sum of $52.00 per acre; that in fixing and determining construction charges to be made and collected in said unit, the then Secretary of the Interior estimated and allocated the cost of the various features of said project, including reservoirs for storage purposes common to said unit, and the charge per acre for irrigable lands included within said unit as estimated by the then Secretary of the Interior were sufficient according to said allocation to return to the Reclamation fund of the United States the sum that had been expended or would be expended in the building and construction of the storage reservoirs and irrigation system; that thereafter the then Secretary of the Interior did cause to be constructed and completed, storage reservoirs by which the flood water of the Yakima River and its tributaries were collected and impounded during the period of freshets, high water, and during the season when water was not needed for irrigation and of sufficient capacity to furnish sufficient water in normal seasons to beneficially and successfully irrigate the land herein described and all other lands in the Sunnyside unit of the Yakima project and all other lands entitled to receive water from the Yakima River and said storage reservoirs.

3 IV

That about the time of the purchase by the Secretary of the Interior for the United States of said irrigation system and at the time the construction of said project was contemplated and considered by the then Secretary of the Interior, it was stated and represented by the then Secretary of the Interior, his representatives and subordinates, that before said project could be purchased or the construction of said works could be undertaken, that the owners of the

land herein described and other lands susceptible to irrigation by gravity flow from said system should cooperate with the then Secretary of the Interior to the extent of incorporating the Sunnyside Water Users Association and placing their said private lands in said project and agreeing to take water for the purpose of irrigating their said lands from said project and that for the purpose of inducing said landowners of said private lands to so cooperate with the then Secretary of the Interior and to incorporate the Sunnyside Water Users Association and to place their lands under said project and agree to take water therefrom and execute a stock-subscription contract and water-right application for the purchase of the water therefrom, it was represented and stated by the representatives and subordinates of the then Secretary of the Interior that beneficial use was the basis, the measure, and the limit of the water right that would be furnished and that a sufficient amount of water would be furnished to successfully and beneficially irrigate the land herein described at all times during the irrigation season, save, and except in extremely dry years, and that the entire cost of building and constructing said completed works would not exceed the sum of $52.00 per acre; that said representations and statements so made by the Secretary of the Interior of the United States and by his representatives and his subordinates were made on numerous occasions and at mass meetings held by said private landowners at the request of said representatives and subordinates for the purpose of considering the advisability of entering into said arrangement and aiding and participating in the construction and promotion of said enterprise; that at that time the question as to the amount of water that would be delivered and the cost to the owner of said land in the construction and completion of said project were matters of vital importance and were also matters as to which the then owners of the land herein described were not otherwise advised and they were compelled to rely upon the statements and representations of the then Secretaries of the Interior, their representatives and subordinates.

V

That the then owners of the land herein described and predecessors in title of plaintiff relied absolutely and entirely upon the aforesaid statements and representations and upon the statements and representations in this complaint set forth, believed them to be true and would not, except for such statements and representations, have participated in the incorporating said Sunnyside Water Users Association and would not have subscribed for shares of stock therein and would not have executed the water-right application as herein alleged to take water for their said land from said project
4 but for such statements and representations; that being induced and persuaded thereby, the then owners of the land herein described and the owners of additional land under gravity flow of said irrigation system did, as a matter of fact, proceed to in-

corporate the Sunnyside Water Users Association as herein set forth and that said association by reason of such statements and representations and inducements was organized and incorporated and thereafter a contract was entered into between said association and the then Secretary of the Interior acting for and on behalf of the United States, a copy of which is hereto attached marked "Exhibit A" and made a part hereof; that thereafter the then owners of the land herein described executed the required stock-subscription contract with said association.

VI

That thereafter and before the owners of the land herein described could procure water for the irrigation of said land from the irrigation system so constructed by the United States as aforesaid, it was necessary that they make, execute, and deliver to the United States water-right applications for water to be used upon and in the irrigation of their land; that the then owners of the land herein described, relying upon the statements and representations herein alleged and set forth, executed a water-right application, a copy of which is hereto attached, marked "Exhibit B" and made a part hereof; that by the terms of said water-right application said owners contracted and agreed to pay to the United States for the water so made available for the irrigation of their lands the sum per irrigable acre that was fixed and announced by the then Secretary of the Interior by public notice, to wit: $52.00 per acre.

VII

That Agnes E. Phillips and T. S. Phillips, her husband, were on February 28th, 1912, the owners in fee simple of the land herein described, bona fide residents and occupants thereof; that they did not own any other land in Federal reclamation project and that they acted for and on behalf of themselves and not at the instance or request of any other person, association, or corporation, either directly or indirectly, and being fully qualified under the Reclamation Act and acts amendatory thereof and supplementary thereto, they did make a water-right application to purchase from the United States, pursuant to the terms of said Reclamation Act, a water right for said land and did agree to pay for said water right the sum of $52.00 per acre; that thereafter the plaintiff acquired all right, title, and interest of said applicants in and to said land and water right; that the plaintiff and his predecessors in title paid to the United States the sum of $52.00 per acre and also all operation and maintenance charges that have heretofore accrued, and on February 28th, 1934, a water right for said premises was conveyed by the United States of America to the plaintiff herein.

VIII

That by the terms of the Reclamation Act and acts amendatory and supplemental thereto the Secretary of the Interior is charged

with the administration thereof; that for a period of more
5 than twenty years after the execution of the aforesaid water right application the representatives and subordinates of the then Secretaries of the Interior and their representatives and subordinates, uniformly construed said acts of Congress and said contracts as requiring the delivery to said land of such amount of water that was necessary to beneficially and successfully irrigate the same, which said amount for a period of more than twenty years was actually determined by the representatives and subordinates of the then Secretaries of the Interior by going upon said land from time to time and from a factual investigation as to the water requirements of various crops growing on or to be planted on said land, the condition of the soil, climatic conditions, and other facts, which said representatives and subordinates obtained upon said personal investigation and examination; that after said information was so obtained the representatives and subordinates of the then Secretary of the Interior made a determination of the amount of water necessary to successfully and beneficially irrigate said land, and after said determination was so made and that at all times during each irrigation season from the date of said water right application in 1912, until about August 17th, 1934, the then Secretary of the Interior and his representatives and subordinates, save and except two years of extreme water shortage, actually delivered to said land the amount of water so determined to be necessary to beneficially and successfully irrigate the same and the crops growing thereon, which said amount fluctuated from year to year depending upon crop requirements and climatic conditions; that the amount of water so determined to be necessary by the representatives and subordinates of the Secretaries of the Interior to beneficially and successfully irrigate said land and the amount actually delivered each year to said land on an average for more than twenty years was between five and one-half and six acre-feet per acre per annum, measured at the land and the amount actually so determined to be necessary and delivered on an average during the past ten years and beneficially used without waste to irrigate said land was 5.56 acre-feet, measured at the land.

IX

That the Reclamation Act under and pursuant to which the then Secretary of the Interior authorized the purchase of the Sunnyside Canal and the building and construction of the reservoirs and distribution system and under and by virtue of which contracts herein referred to were executed and which became a part of each of said contracts gives the following measure of a water right for said land, to wit:

"That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

that the contract between the then Secretary of the Interior acting for the United States and the Sunnyside Water users Associaion herein referred to expressly provides:

"That in all the relations between the United States and this association and the members of the association, the rights of the members of the association to the use of water where the same have vested, are to be defined, determined, and enjoyed in
6 accordance with the provisions of the said act of Congress and of other acts of Congress on the subject to the acquisition and enjoyment of the rights to use water, and also by the laws of the State of Washington, where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and bylaws of said association;"

that under the decisions of the Supreme Court of the State of Washington where water is beneficially used upon lands for irrigation purposes, the same becomes appurtenant to the land on which the water is so used and said water cannot be diverted from said land without the consent of the owner thereof, and said water right is real estate.

X

That the plaintiff and his predecessors in title to said land and water right relying upon the statements and representations as herein alleged, made by the then Secretary of the Interior, his representatives and subordinates and the determination made by the Secretaries of the Interior, their representatives and subordinates as to the amount of water actually necessary to successfully and beneficially irrigate said land over a term of years and the actual delivery by said representatives and subordinates of the Secretaries of the Interior of the amount of water so determined to be necessary to successfully irrigate said land, joined with other water users in said Sunnyside unit in 1918, in the organization and incorporation of the Sunnyside Valley Irrigation District and authorized said district to enter into contract with the United States of America, by the terms of which the land herein described was bound to pay the charges of all other land in said unit and in said district in the event the owner thereof did not pay to the extent of $2,000,000.00.

XI

In the practical administration of said project the Secretaries of the Interior, their representatives, and subordinates have, for a period of twenty years, consistently construed the Reclamation Act to require the delivery to said land herein described of that amount of water during the irrigation season which was necessary to beneficially and successfully irrigate the same and actually determined from a factual investigation from time to time during said period that from five and one-half to six acre-feet of water per acre per annum, measured at the land, was necessary to beneficially and suc-

cessfully irrigate the same and in the operation of said project have consistently, for a period of more than twenty years, actually delivered the amount of water so determined to be necessary to beneficially irrigate said land without requiring any additional payment on account of construction, and at all times prior to the acts of the defendant, his representatives, and subordinates herein alleged have so construed the plaintiff's rights with respect to water to irrigate said land that he was the owner of a sufficient amount of water to beneficially and successfully irrigate the same, amounting to from five and one-half to six acre-feet.

7 XII

That the defendant made an order and ruling that unless the plaintiff signed a contract to pay rental for all water in excess of three acre-feet, that no water above said amount would be permitted to flow on his land, and that the same would be diverted, and notified the plaintiff that unless he signed the water rental application for water in excess of three acre-feet per acre per annum, measured at the land, in the words and figures following, to wit:

"WATER RENTAL APPLICATION

"The undersigned application requests excess water under public notice issued by the Secretary February 19, 1932, and agrees to pay applicable charges, with 5% interest from December 1, 1934, until paid. He further agrees that water may be withheld from his land after 1934 until such charges are paid. It is understood that advance payment will be required in 1935 if the 1934 rental charge remains unpaid at that time.

"Witness: "Water user;

"_____ _____ _____ _____"

that no water in excess of three acre-feet per acre per annum would be delivered to the land herein described; that the head gates would be shut down to the land herein described to three acre-feet per acre per annum, measured at the land; that the defendant, as Secretary of the Interior of the United States, his representatives and subordinates acting under his direction, contrary to the terms of the Reclamation Act herein referred to, contrary to the terms of the contract between the Sunnyside Water Users Association and the United States herein referred to, contrary to the plain wording of said act of Congress, and said contract, contrary to the practical construction of said act of Congress and contract by the then Secretaries of the Interior, his representatives and subordinates, acting under his direction and with his knowledge and consent, for a period of more than twenty years, that said land was entitled to the amount of water that could be beneficially used thereon, contrary to the determination of the representatives and subordinates of the then Sec-

retaries of the Interior as to the amount of water necessary to beneficially and successfully irrigate said land and contrary to the decisions of the Supreme Court of the State of Washington that when water is beneficially used upon land it becomes appurtenant thereto and the title passes to the owner of the land, did on or about August 17th, 1934, shut off the supply of water from the land of the plaintiff herein described in excess of three acre-feet per acre per annum, measured at the land; that at the time said head gates were so shut down, ample water was available and in storage reservoirs and flowing in the Yakima River and in the Sunnyside Canal and laterals flowing therefrom to furnish said land and all other land within the Sunnyside unit of the Yakima project and to furnish all other lands entitled to receive water from said reservoirs and from the Yakima River to successfully and beneficially irrigate the same during the remainder of the irrigation season of 1934 and leave a surplus of 200,000 acre-feet unused in said reservoirs.

8

XIII

That at the time said head gates were shut down on August 17th, 1934, the title to the 40% of the water necessary to beneficially and successfully irrigate said land, which was diverted therefrom, was vested in the plaintiff and was appurtenant to said land; that the title to said water vested in the plaintiff as soon as it was impounded in storage reservoirs and when it was flowing in the Yakima River and Sunnyside Canal and irrigation system; that the plaintiff was the owner of an easement in said irrigation system necessary for the purpose of carrying said water and that the representatives and subordinates of the defendant who were in charge of said irrigation system and who had charge of the delivery of the water so owned by the plaintiff were merely performing a ministerial and executive duty in delivering said water to plaintiff prior to the time said head gates were shut down; that it is the executive and ministerial duty of said representatives and subordinates to open said head gates and to permit the water owned by plaintiff to flow thereon and the defendant by his acts, as herein alleged, prevent them from performing that duty and tend to bring the United States into disrepute.

XIV

That the order and ruling requiring a new contract in the form of water rental application to be entered into as hereinabove alleged and set forth and the acts of the defendants and his representatives and subordinates in shutting down the head gates to three acre-feet per acre per annum, measured at the land and diverting from plaintiff's land and not permitting to flow thereon, the remainder of the water owned by him, were arbitrarily made and done and were not made in good faith and were made without regard to and in violation of the act of Congress aforesaid, the contract referred to

herein, the practical construction of said act of Congress and contract between the then Secretaries of the Interior, their representatives, and subordinates acting under their direction for a period of more than twenty years and without regard to the determination made by the representatives and subordinates of the then Secretaries of the Interior as to the amount of water necessary to successfully and beneficially irrigate said land and the amount of water that was actually delivered to said land for a period of twenty years prior to said date and without regard as to the amount of water actually available or necessary to beneficially and successfully irrigate said land and without regard to the decisions of the Supreme Court of the State of Washington to the effect that where water is beneficially used to irrigate land it becomes appurtenant thereto; that in making said ruling requiring said water rental contract to be executed and in shutting down the head gates as aforesaid the defendant, his representatives, and his subordinates acting under his direction, failed to exercise an honest judgment and failed to exercise any judgment whatever and failed to exercise good faith and arbitrarily made said order and arbitrarily shut down said head gates for the express purpose and intent of coercing and forcing the plaintiff and other owners of land in the Sunnyside unit of the Yakima project and
9 located within the Sunnyside Valley Irrigation District to authorize said district to enter into contract with the United States of America to purchase a supplemental water right for their said lands, including the land herein described, over and above the water rights theretofore purchased at a cost of $1,000,000.00 and binding the last faithful acre of land in said district and the land herein described to pay said sum, and all of said acts were contrary to the terms of and in violation of the terms of the Reclamation Act herein referred to and in violation of the terms of the contracts herein referred to and in violation of the construction of said act of Congress and contracts by the Secretaries of Interior and their representatives and subordinates acting under their direction for a period of more than twenty years and in violation of the practical determination by the representatives and subordinates of the Secretaries of the Interior over a period of twenty years as to the amount of water necessary to successfully and beneficially irrigate said land or the amount that could be beneficially used thereon or the amount of water available for the irrigation thereof and were arbitrary and unreasonable and were not made or done in good faith and the effect of said acts by the defendant, his representatives and subordinates, was to deprive the plaintiff of more than 40% of the water owned by him and which was appurtenant to his said land and in violation of vested rights of the plaintiff.

XV

That said order and notice issued by the defendant and the requirements that the head gates to plaintiff's land be shut down to

three acre-feet unless said water rental application was executed as herein alleged, was an attempt on the part of the defendant, his representatives and subordinates to collect from the plaintiff and other water users in the Sunnyside unit of the Yakima project the additional sum of $1,000,000.00 and also was an attempted evasion and violation of the express terms of the act of Congress passed and approved in 1914 (38 Stat. 687), which expressly provides that no increase in the construction charges shall hereafter be made after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water right applicants and entrymen to be affected by such increase; that the majority of the water right applicants in the Sunnyside unit of the Yakima project and in said district and none of them ever consented to an increase in the construction charges.

XVI

That there was on August 17th, 1934, and has been at all times since said date an ample supply of water available to furnish the plaintiff the water necessary to beneficially and successfully irrigate his said land and to beneficially and successfully irrigate all lands in the Sunnyside unit of the Yakima project and all other lands entitled to receive water from said storage reservoirs and from the Yakima River and said water has been actually impounded in said storage reservoirs and a portion of which was diverted from the Yakima River and was flowing in the main Sunnyside Canal and laterals leading therefrom at the time the head gates were shut down as aforesaid.

10

XVII

That the plaintiff is informed and believes and therefore asserts that Harold L. Ickes, as Secretary of the Interior, his representatives and subordinates intend and purpose to continue keeping the head gates to plaintiff's land closed and locked so that not more than three acre-feet of water per acre per annum will be permitted to flow on plaintiff's land and to continue to divert and destroy the remainder of the water owned by the plaintiff, to wit: To divert and destroy about two and one-half acre-feet of the water owned by the plaintiff.

XVIII

That the threatened acts of Harold L. Ickes, Secretary of the Interior, his representatives and subordinates to continue keeping the head gates closed so that not to exceed three acre-feet of water will flow on said land and diverting and destroying the remainder of the water belonging to the plaintiff is unwarranted, arbitrary, and illegal and that if consummated, it will deprive the plaintiff of valuable property rights acquired in good faith by virtue of the Reclamation Act, contract with the Sunnyside Water Users' Association, practical construction of said act of Congress and contract

by the then Secretaries of the Interior and their representatives and subordinates a period of twenty years as to the amount of water that plaintiff and his predecessors in title were entitled to receive from said water supply and the amount necessary to beneficially and successfully irrigate said land and the amount of water delivered thereto and the rights acquired by the beneficial application of said water to said land for a period of more than twenty years, by virtue of which, under the laws of the State of Washington, which are applicable, the title to the amount of water necessary to beneficially irrigate said land vested in the plaintiff and further, in that the said Harold L. Ickes, Secretary of the Interior, his representatives and subordinates, are without power or authority to set aside the practical construction by his predecessors in office, their representatives and subordinates in the determination of the amount of water plaintiff was entitled to receive under said act of Congress and said contract and the plain wording of said act of Congress and said contract, and to nullify the decisions of the Supreme Court of the State of Washington to the effect that where water is beneficially used upon land it becomes appurtenant to the land the title vests in the owner of said land.

XIX

That plaintiff has no plain, adequate, or complete remedy at law and effective relief can only be administered in a court of equity. The injury to plaintiff is not measurable in damages and is irreparable and cannot be compensated for in an action at law.

XX

That this suit arises under the Constitution and laws of the United States and involves the construction of the Constitution of the
11 United States, acts of Congress and the construction of contracts entered into by the United States of America; that the amount of the value of the matter in controversy herein between the plaintiff and the defendant exceeds the sum of $3,000.00, exclusive of interests and costs.

Wherefore, the plaintiff prays:

1. That the process of this court issue directed to the defendant Harold L. Ickes, Secretary of the Interior requiring him to appear and make answer to the foregoing bill of complaint, but not under oath, answer under oath being hereby expressly waived.

2. That upon the filing of this bill or at such time thereafter as shall be fixed by the court, a preliminary order may issue herein enjoining pendente lite, the defendant, his successors in office and each and every and all persons claiming to act under his authority and control from diverting from plaintiff's land, any portion of the water owned by him and requiring the head gates to plaintiff's land to be so adjusted that the amount of water owned by plaintiff and which he is entitled to have flow on said land may flow thereon and requiring the defendant to desist from enforcing the orders heretofore issued by him requiring the execution of said water in excess of

three acre-feet, and that upon the final determination of this action such injunctive order be made perpetual and permanent.

3. That the plaintiff may have such other and further relief as the nature of the case may demand and require and may be agreeable to equity.

STEPHEN E. CHAFFEE,
Attorney for Plaintiff.
PRESTON B. KAVANAGH,
P. C. KING, JR.,
Attorneys for Plaintiff.

[*Duly sworn to by Jacob F. Ottmuller; jurat omitted in printing.*]

Exhibit A to bill of complaint

CONTRACT BETWEEN THE SUNNYSIDE WATER USERS ASSOCIATION AND THE SECRETARY OF THE INTERIOR

These articles of agreement, made and entered into this 7th day of May 1906, by and between the United States of America, acting in this behalf by E. A. Hitchcock, Secretary of the Interior, party of the first part, and the Sunnyside Water Users Association, a corporation duly organized and existing under the laws of the State of
12 Washington, party of the second part, their successors and assigns, witnesseth:

That whereas the Sunnyside Water Users Association is a corporation organized and existing under the laws of the State of Washington for the purposes mentioned in its articles of incorporation and bylaws, a copy of which is appended to this agreement and is, for every purpose of the interpretation, construction, and consideration of this agreement and of the rights of the parties hereunder, to be deemed, held, read, and considered as if fully written out or printed herein, and deemed a part hereof; and

Whereas the lands embraced within the area proposed to be irrigated as described in said articles of incorporation or bylaws are naturally desert and arid and incapable of proper cultivation without irrigation, and will to a greater or less extent remain unreclaimed, unfit for habitation, and uncultivation, in which condition they, or a great part thereof now are, unless the waters of the Yakima River in State of Washington, and its tributaries be impounded and the flow thereof otherwise regulated and controlled; and

Whereas the Secretary of the Interior contemplates the construction of certain irrigation works under the provisions of an act of Congress entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands", approved June 17, 1902, for the irrigation and reclamation of the lands described in the said articles or bylaws; and

Whereas the incorporators and shareholders of said Sunnyside Water Users Association are, and under the provisions of its articles of incorporation and bylaws must be, owners and occupants of lands

in said area, and in some cases are appropriators of water for the irrigation thereof, and in addition thereto such incorporators and shareholders and their successors or assigns must initiate rights to the use of water from the said proposed irrigation works, to be constructed by the Secretary of the Interior as soon as such rights may be initiated, and thereafter complete the acquisition thereof in the manner and upon the terms and conditions to be prescribed therefor by the Secretary of the Interior, which rights shall be, and thereafter continue to be, forever appurtenant to designated lands owned by such shareholders; and

Whereas neither the relative priority nor the extent of the individual appropriations of such water heretofore made by said incorporators and shareholders for the lands described in said articles or bylaws, and which are now vested rights, have been ascertained or determined, but said incorporators and shareholders have agreed, among themselves, by the terms and provisions of said articles of incorporation and bylaws, upon the rules and principles by and upon which the relative priority and the extent of their several appropriations and vested rights to the use of such waters shall be determined:

Now therefore, it is agreed and understood by and between the parties hereto,

1. That if the Secretary of the Interior shall authorize and cause the construction of said irrigation works, the said association will take prompt action to secure the determination by the courts
13 of the relative rights of its shareholders to the use of water for said lands, and that in the determination of such rights and of their respective rights to the use of water acquired under said act of Congress the rules and principles set out in said articles of incorporation and bylaws, for such determination, shall be deemed the established rules and principles for that purpose.

2. That only those who are or who may become members of said association, under the provisions of its articles of incorporation and bylaws, shall be accepted as applicants for rights to the use of water available by means of said proposed irrigation works.

3. That the aggregate amount of such rights to be issued shall, in no event, exceed the number of acres of land capable of irrigation by the total amount of water available for the purposes being (1) the amount now appropriated by the shareholders of the said association, and (2) the amount to be delivered from all sources in excess of the water now appropriated; and that the Secretary of the Interior shall determine the number of acres so capable of such irrigation as aforesaid, his determination to be made upon due and expert consideration of all available data, and to be based upon and measured and limited by the beneficial use of water.

4. That the payment for the water rights to be issued to the shareholders of said association, under the provisions of said act of Congress, shall be divided into not less than ten annual payments, the first of which shall be payable when the water is first delivered from

said works, or within a reasonable time thereafter, and after due notice thereof by the Secretary of the Interior to the association, and that the cost of said proposed irrigation works shall be apportioned equally per acre among those acquiring such rights.

5. That the said Water Users Association hereby guarantees the payments for that part of the cost of the irrigation works which shall be apportioned by the Secretary of the Interior to its shareholders, and will promptly levy calls or assessments therefor and for the cost of maintenance and operation as may be assessed from year to year by the Secretary of the Interior, and collect or require prompt payment thereof in such manner as the Secretary of the Interior may direct; that it will promptly pay the sums collected by it to the receiver of the local land office for the district in which said lands are situated; that it will promptly employ the means provided and authorized by the said articles of incorporation or bylaws for the enforcement of such collections, and will not change, alter, or amend its articles of incorporation or bylaws in any manner whereby such means of collection, or the lien given to it by the shareholders to secure the payment thereof, or of any assessments contemplated or authorized thereby, shall be impaired, diminished, or rendered less effective, without the consent of the Secretary of the Interior.

6. That the United States shall in no manner be responsible for the sums collected by said association until they have been paid into the hands of the receiver of the local land office as provided by the law, and in accordance with such regulations as may be prescribed by the Secretary of the Interior.

7. That for the purpose of enforcing said collections, the association will adopt and enforce proper bylaws, subject to the ap-
14 proval of the Secretary of the Interior, and not change them so as to in anywise impair their efficiency for said purpose, and will otherwise do any and all things it is authorized and empowered to do in the premises.

8. That the association will adopt and enforce such rules and regulations as it is authorized by its articles of incorporation and bylaws to adopt and enforce concerning the use of water by its shareholders and concerning the administration of the affairs of the association, to effectually carry out and promote the purposes of its organization, within the provisions of said articles of incorporation and bylaws, which rules and regulations shall be subject to the approval of the Secretary of the Interior, and that if the association fail to make and adopt such rules and regulations, then the Secretary of the Interior may prescribe them; but in such event the Secretary of the Interior shall impose no rule or regulation interfering with any vested right of the shareholders of the association as defined or modified by said articles of incorporation and bylaws.

9. That persons who are not now members of the association but who may be the owners or occupants of land to be irrigated, as described in its articles of incorporation or bylaws, or of added lands as therein provided for and to whom rights to the use of water from

the proposed irrigation works may be issued by the United States, may be at the designation of the Secretary of the Interior, become members of the association upon subscribing to the stock thereof and upon compliance with the other conditions for such membership.

10. That in all the relations between the United States and this association and the members of the association the rights of the members of the association to the use of water where the same have vested, are to be defined, determined, and enjoyed in accordance with the provisions of the said act of Congress and of other acts of Congress on the subject of the acquisition and enjoyment of the rights to use water, and also by the laws of the State of Washington, where not inconsistent therewith, modified, if modified at all, by the provisions of the articles of incorporation and bylaws of said association.

11. That nothing contained in this agreement, or to be implied from the fact of its execution, shall be construed, held, or deemed to be an approval by the Secretary of the Interior, nor an adoption by him of the articles of incorporation or bylaws of said association in all their details as the form of organization of water users contemplated and authorized by section 6 of the said act of Congress of June 17, 1902, but such approval and adoption is expressly reserved until the conditions prescribed in said act authorizing such approval and adoption shall have arisen; and that when the Secretary of the Interior shall make, approve, and promulgate rules and regulations for the administration of the water to be supplied from said proposed irrigation works, such rules and regulations and such modifications thereof as the Secretary may from time to time approve and promulgate, shall be deemed and held to be obligatory upon this association as fully and completely, and to every intent and purpose, as if they were now made, approved, promulgated, and written out in full in this agreement, and the same are to be so read and construed.

15 In witness whereof, the undersigned have hereunto subscribed their names and affixed their seals the day and year first herein written.

Department of the Interior:

THOS. RYAN;

Secretary of the Interior acting for and on behalf of the United States of America, party of the first part.

SUNNYSIDE WATER USERS ASSOCIATION,

By S. J. HARRISON, *President,*

Party of the second part.

Attest:

E. J. YOUNG, *Secretary,*

Sunnyside Water Users Association, Incorporated 1906, Washington.

STATE OF WASHINGTON,

County of Yakima, ss:

Be it remembered, that on this 7th day of May, 1906, before me, the undersigned, a notary public in and for said county and State,

personally appeared S. J. Harrison and E. J. Young, to me personally known to be the president and secretary, respectively, of the corporation, to wit, Sunnyside Water Users Association, that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

WM. B. BRIDGMAN,
Notary Public for Washington, residing at Sunnyside.

Exhibit B to bill of complaint

4–020

DEPARTMENT OF THE INTERIOR

Water-Right Application—Act June 17, 1902 (32 Stat. 388)—Yakima-Sunnyside project

U. S. Land Office, North Yakima, Washington. Serial No. 04168. Lands in private ownership.

FEBRUARY 28, 1912.
(Date)

Agnes E. Phillips & T. S. Phillips, her husband, hereinafter called the applicant, hereby applies for a water right under the ------ unit, Yakima-Sunnyside project, subject to the provisions of the act of Congress approved June 17, 1902 (32 Stat. 388), known as the "Reclamation Act", and the rules and regulations established thereunder, the water supplied in pursuance thereof to be used for the irrigation of, and to be appurtenant to, forty (40) acres of
16 irrigable land, as shown on plats approved by the Secretary of the Interior, within the area described as follows:

The southwest quarter of the southeast quarter (SW¼ SE¼), being lots 1 to 18, block 1, East Park Addition to Mabton, section 31, township 9, range 23 E., W. meridian, an area of forty (40) acres.

The quantity of water to be furnished hereunder shall be 3 acre-feet of water per annum per acre of irrigable land, as aforesaid, measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided, that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land; provided, however, that if measuring devices are not installed at the land, an increase deemed reasonable by the reclamation service official in charge of the project shall be made for losses of water after passing the point of measurement.

The applicant hereby agrees on behalf of himself, his heirs, administrators, and assigns to pay for said water right the estimated cost

of construction as fixed by the Secretary of the Interior, namely, the sum of $52.00 per acre for forty acres of irrigable land, in not more than ten (10) annual installments, and to pay promptly when due the annual installments and the operation and maintenance charges duly assessed against said land on account of said water right, each and all of which installments and operation and maintenance charges are hereby made and shall be a lien against the above-described premises, such liens attaching immediately upon the execution hereof and being enforcible as to each and every installment, or charge, or portion thereof at such time as the same shall become due in pursuance of public notice issued by the Secretary of the Interior.

It is further agreed and provided that such lien or liens shall have the full force and effect of a mortgage or deed of trust and vest in the United States all the rights and powers which might be exercised and all benefits which might be claimed by the mortgagee in a real-estate mortgage given to secure the payment of a loan or debt, including the right of foreclosure by or on behalf of the United States in any court of competent jurisdiction, and the applicant grants to the United States or its transferee all the rights, powers, and authority in and over the above-described premises which might be exercised by the trustee named in a deed or trust given to secure the payment of a loan or debt.

The applicant further agrees and binds himself, his heirs, administrators, and assigns to pay all taxes and other liens and encumbrances which are now or may hereafter (during the life of the lien herein given to the United States) become a superior lien or encumbrance to that of the United States; and if the applicant, his administrators, executors, heirs, or assigns fail to pay any such tax, lien, or encumbrance when due, the United States may pay the same and add the amount thereof to the lien held by the United States under this agreement and recover the same.

It is further agreed that upon failure of the applicant to comply with the terms of said Reclamation Act and the regulations thereunder, this application shall be subject to cancellation by the
17 Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

This application must bear the certificate, as hereto attached, of the water users' association under this project, which has entered into contract with the Secretary of the Interior, and the liens which the United States holds against the above-described land for the payment of the building and operation and maintenance charges may be enforced, at the option of the United States, either directly by the United States or through the medium of the water users' association.

If the Secretary of the Interior has made no contract with a water users' association under this project the applicant agrees to file, upon his direction, evidence of membership in the water users' association organized under the said project, in default of which this application shall be subject to cancellation by the Secretary of the Interior, with

the forfeiture of all rights acquired thereunder and all payments made thereon.

And, being duly sworn, the applicant further deposes and says that the post-office address of the undersigned is Mabton, Washington; that the undersigned is a bona fide resident upon said land (or an occupant thereof, residing in the neighborhood, namely, upon section 31, township 9, range 23 E., W. meridian, a distance in a direct line of —miles therefrom); that the undersigned holds the following interest in the said tract: Deed, as duly shown upon the records of Yakima County, Washington; that no other application now uncanceled has been made for a water right under said act of Congress appurtenant to land now owned or claimed by the undersigned except as follows:

Application no. ------, ------ project, ------, of ------ for ------ section ------, township ------, range ------, ------ meridian, an area of ------ acres and containing ------ acres of irrigable land, as determined by the Secretary of the Interior; and that the present application is made in behalf of the undersigned and not at the instance or for the benefit of any other person or any association or corporation, either directly or indirectly. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment or either before or after he has qualified and during his continuance in office, and no officer, agent, or employee of the Government shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in section 116 of the act of Congress approved March 4, 1909 (35 Stat. 1109).

It is further understood and agreed that if the interest of the applicant in said land shall cease and said interest shall be held by a party who is not qualified to apply for or hold a water right under the provisions of the Reclamation Act, this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

It is further understood and agreed that the evidence of ownership of this water right shall not be issued by the United States unless fee-simple title to said land is vested in the applicant, or in a
18 qualified assignee hereof, whose aggregate water rights under the said Reclamation Act shall not exceed one hundred and sixty acres, or the maximum limit of area fixed by the Secretary of the Interior, at the time when final payment hereon is due, in default of which this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights thereunder and of all moneys paid thereon.

(Sgd.) AGNES E. PHILLIPS,
(Sgd.) T. S. PHILLIPS,
Applicant.

ACKNOWLEDGMENT

STATE OF WASHINGTON,
County of ———, *ss:*

I, G. W. Paswater, a notary public in and for the State aforesaid, do hereby certify that on this 15 day of April 1912, personally appeared before me Agnes E. Phillips & T. S. Phillips, her husband, to me known to be the individuals described in and who executed the within and foregoing instrument and acknowledged that they signed and sealed the instrument of writing as their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL] (Sgd.) G. W. PASWATER,
Notary Public in and for the State aforesaid, residing at Mabton.

My commission expires Dec. 28, 1913.

The above application must be signed and sealed in duplicate, acknowledged before a duly authorized officer in the manner provided by local law and duly recorded in the records of the county in which the lands are situated.

Filed in the United States land office at North Yakima, Washington, and accepted May 18, 1912, on behalf the United States.

(Date)

(Sgd.) HARRY Y. SAINT, *Register.*

If the Secretary of the Interior has entered into a contract with a water users' association under the project, the following certificate must be filled out:

———, 191__.

I hereby certify that the applicant for this water right has duly subscribed (or is the successor in interest of one who has subscribed) for the stock of this association for the lands described herein, and that all assessments levied against said stock by said association have been fully paid up to date.

[CORPORATE SEAL] ——— ———,
Secretary ——— *Water Users' Association.*

OATH OF DISINTERESTEDNESS

(Section 3745, U. S. Revised Statutes)

I do solemnly swear that the copy of contract hereunto annexed is an exact copy of contract made by me personally with Agnes E. Phillips and T. S. Phillips, her husband, that I made the same
19 fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said Agnes E. Phillips and T. S. Phillips, her husband, or any other person; and

that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided.

(Sgd.) HARRY Y. SAINT,
Register.

Sworn to and subscribed before me at North Yakima, Washington, this 18th day of May 1912.

(Sgd.) A. C. STEIMAN,
Receiver.

In Supreme Court of District of Columbia

Order permitting amendment

Filed January 2, 1935

* * * * * * *

Upon consideration of the plaintiff's motion made in open court and it appearing that the defendant, through his attorney, consents ther'to, it is this 2d day of January 1935—

Ordered, adjudged, and decreed that the plaintiff be and he hereby is permitted to file an amendment to the bill of complaint heretofore filed by them in the above described cause.

JESSE C. ADKINS, *Justice.*

The foregoing order is hereby consented to this 27th day of December 1934.

J. KENNARD CHEADLE,
Attorney for Defendant.

In Supreme Court of District of Columbia

Amendment to bill of complaint

Filed January 2, 1935

* * * * * * *

Comes now the plaintiff by his attorney and having obtained leave of this court therefor, amends the bill of complaint filed by him herein, as follows:

I

At the end of paragraph XVI of the bill of complaint, add the following:

"That three acre-feet of water per acre is not now, never has been, and will not in the future be sufficient to beneficially irrigate the land belonging to the plaintiffs herein."

II

Insert the following paragraph in lieu of paragraph XIX of the complaint:

"That a maximum of three acre-feet of water per acre furnished the land of the plaintiffs would enable them to beneficially irrigate

about one-half of their said land, leaving the other one-half thereof barren and nonproductive, thereby forcing one-half of the land belonging to plaintiffs to bear the construction and maintenance charges for the whole tract of land. That if plaintiff attempted to spread a maximum of three acre-feet of water per acre over the whole tract of land belonging to them, they would not have sufficient water to grow any profitable crop and their land would be completely destroyed for farming purposes, causing them to suffer irreparable loss and damage which could not be compensated for in an action at law, and plaintiffs have no adequate or complete remedy at law and effective relief can only be administered in a court of equity."

JACOB F. OTTMULLER.

STEPHEN E. CHAFFEE.
P. C. KING, JR.
PRESTON B. KAVANAGH.

[*Duly sworn to by Jacob F. Ottmuller; jurat omitted in printing.*]

In Supreme Court of District of Columbia

Motion to dismiss

Filed February 8, 1935

* * * * * * *

Comes now Harold L. Ickes, Secretary of the Interior, the defendant in the above-entitled cause, and moves to dismiss the above-entitled cause and the plaintiff's amended bill of complaint in said cause upon each and every of the following grounds:

1. That the defendant has no individual interest in the controversy, and the relief sought against him is in his official capacity only, as a representative of the Government, which alone is to be affected by any decree herein, wherefore this suit, as manifest upon the face of the amended bill of complaint, is essentially and substantially a suit against the United States, beyond the jurisdiction of the court.

2. That the amended bill of complaint and the exhibits attached thereto and made a part thereof show that this suit is brought on contracts to which the United States is a party and that the decree prayed for would affect the interest of the United States in said contracts and the property of the United States, whereof the court is without jurisdiction.

3. That it is manifest, upon the face of the amended bill of complaint, that the plaintiff seeks, in substance and effect, a decree for specific performance by the United States of alleged obligations under its contracts, whereof the court is without jurisdiction.

4. That it appears by the amended bill of complaint that the plaintiff has a plain, adequate, and complete remedy at law, if he has any right.

21 5. That it is manifest, upon the face of the amended bill of complaint, that the relief prayed for therein would necessarily involve continued and detailed supervision by this court, for a long and indefinite period, of the performance of contract duties that require the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

Wherefore, the defendant, Harold L. Ickes, Secretary of the Interior, prays that the above-entitled cause be dismissed, that the amended bill of complaint in said cause be dismissed, and that he be permitted to go hence without day, be for nothing held and recover of the plaintiff his costs.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
CHARLES FAHY,
First Assistant Solicitor, Department of the Interior,
J. KENNARD CHEADLE,
Assistant Solicitor, Department of the Interior,
HOWARD R. STINSON,
Assistant Solicitor, Department of the Interior,
Attorneys for defendant.

Service of above motion acknowledged this 8th day of February 1935.

P. C. KING, Jr.,
Atty. for Plaintiff.

In Supreme Court of District of Columbia

Memorandum opinion

Filed April 1, 1935

* * * * * * *

In each of these cases the bill seeks to compel the defendant to carry out an executor's contract of the United States. I think that the cases of Boeing Air Transport, Inc., v. Farley, and Wells v. Roper are controlling. The defendant, as Secretary of the Interior, is in control of the irrigation project, and the effect of granting to the plaintiffs the relief sought would be to specifically enforce contracts of the United States.

The bills will be dismissed with costs.

BAILEY, *J.*

In Supreme Court of District of Columbia

Order granting motion to dismiss, &c.

Filed April 19, 1935

* * * * * * *

The above-entitled cause having come on to be heard the 29th day of March 1935 on the defendant's motion to dismiss for lack of

jurisdiction in this court to entertain said cause; and at said time the parties thereto having appeared in open court by their respective attorneys and the arguments of said attorneys having been heard, the matter having been submitted and taken under advisement by this court, and the same having been carefully considered, the court being fully advised in the premises: it is hereby,

22 Ordered, adjudged, and decreed this 19th day of April 1935 that the defendant's motion to dismiss be and the same hereby is granted, and that the bill of complaint, as amended, filed herein be, and the same hereby is, dismissed, with leave to file, within fifteen days from the date hereof, a motion for leave to amend, accompanied by the proposed amended bill of complaint.

JENNINGS BAILEY, *Justice.*

Consent as to form:
P. C. KING, Jr.,
Atty. for Plaintiff.

In Supreme Court of District of Columbia

Motion for leave to amend

Filed April 29, 1935

* * * * * * *

Now comes plaintiff, pursuant to an order heretofore entered in this cause, on the 19th day of April, dismissing the bill of complaint then on file and giving the plaintiff fifteen days to file a motion for leave to amend accompanied by the proposed amended bill of complaint, and moves the court for leave to file the proposed amended bill of complaint attached to this motion, for reasons set forth in the memorandum of points and authorities filed in support of this motion.

STEPHEN E. CHAFFEE,
PRESTON B. KAVANAGH,
PRESTON C. KING, Jr.,
Attorneys for Plaintiff.

In Supreme Court of District of Columbia

Memorandum opinion

Filed June 1, 1935

* * * * * * *

It appears from the proposed amended bills that the orders made by the defendant are not authorized by Congress, and had they been so authorized, would have deprived the plaintiffs of vested rights. The suits are not brought against the United States but to set aside unauthorized acts of the defendant in cases in which he has no discretionary powers, and is acting arbitrarily.

The motions for leave to file the amended bills will be granted.

BAILEY, *J.*

In Supreme Court of District of Columbia

Order granting motion for leave to amend, &c.

Filed June 3, 1935

* * * * * * *

The above-entitled cause having come on to be further heard on the plaintiff's motion for leave to amend, said motion having been filed pursuant to leave granted in the order of this court, entered therein the 19th day of April 1935, dismissing the bill of complaint, as amended, theretofore filed therein; and the parties thereto having appeared in open court by their respective attorneys and the
23. arguments of said attorneys on said motion having been heard, the matter having been submitted, and the court being fully advised in the premises; and having filed his opinion granting motions for leave to file amended complaint; it is hereby,

Ordered, adjudged, and decreed this 3rd day of June 1935 that the plaintiff's motion for leave to amend be and the same hereby is granted, and plaintiffs are permitted to file the proposed amended complaints.

It is further ordered that the defendant be required to further plead within the time prescribed by rules of the Court.

JENNINGS BAILEY, *Justice.*

O. K. as to form:

J. KENNARD CHEADLE,
One of Attorneys for Defendant.

In Supreme Court of District of Columbia

Amended bill

Filed June 4, 1935

* * * * * * *

To the Supreme Court of the District of Columbia, holding an equity court:

The plaintiff, by leave of the court first had and obtained, files herein his amended bill of complaint and respectfully represents:

That he is a citizen of the United States and of the State of Washington, residing near Mabton, in Yakima County, Washington, and that his post-office address is Mabton, Washington, and that he brings this suit in his own right and on his own behalf against Harold L. Ickes, a citizen of Illinois, residing in the District of Columbia, and that he complains of the matters and things hereinafter set forth.

I

That the defendant is now and has been since, to wit, March 5th, 1933, the duly appointed, qualified, and acting Secretary of the

Interior of the United States and as such has charge of the administration of the laws of the United States relating to irrigation and reclamation projects, constructed by the United States and particularly to the administration of the act of Congress, known as the "Reclamation Act", being the act of June 17th, 1902 (32 Stat. 388), as amend d and supplemented by later acts of Congress; but solely under and subject to the irrigation and appropriation laws of the State of Washington, and that said defendant is sued in his official capacity as such Secretary of the Interior as hereinafter set forth.

II

That in 1906 the then Secretary of the Interior approved an irrigation and reclamation project known as the "Sunnyside unit of the Yakima project" and on behalf of the United States purchased from the Washington Irrigation Company the Sunnyside Canal, water appropriations, and irrigation system used in connection therewith.

24

III

That the following described real estate, to wit: Southwest quarter of the southeast quarter of section 31, township 9 north, range 23 E., W. M., is situated within said Sunnyside unit of the Yakima project and also within the Sunnyside Valley Irrigation District, an irrigation district organized and existing under the laws of the State of Washington, and within Yakima County, Washington; that at the time of the purchase of said canal, water appropriations, and irrigation system said land was arid and unproductive and had no value but was susceptible to irrigation by gravity flow from said irrigation system; that said land when furnished with the amount of water necessary to beneficially irrigate said land, becomes very productive.

IV

That shortly after the purchase by the Secretary of the Interior for the United States of said canal, water appropriations, and irrigation system; and, at the time of the construction of said project was contemplated and considered by the then Secretary of the Interior, it was stated and represented by the then Secretary of the Interior, his representatives, and his subordinates, that before the construction of the reservoirs and other works could be undertaken, the owners of the land herein described and other land susceptible of irrigation by gravity flow from said system, should cooperate with the then Secretary of the Interior to the extent of incorporating the Sunnyside Water Users Association and placing their said lands in said project and agreeing to take water for the purpose of irrigating their said lands from said project; and also execute a stock-subscription contract and water-right application for the purchase of water for said land; that the owners of the land herein described

and other owners of land susceptible to irrigation by gravity flow from said irrigation system incorporated the Sunnyside Water Users Association under the laws of the State of Washington; that thereafter a contract was entered into between said corporation and the United States, a copy of which is hereto attached, and made a part hereof, marked "Exhibit A."

V

That James Rudolph Garfield was Secretary of the Interior; and as Secretary of the Interior he ascertained the total cost of purchasing said irrigation system, additional construction cost of said system, and construction of necessary storage reservoirs of sufficient capacity to furnish said land and all other land in said unit with such an amount of water as was necessary to beneficially and successfully irrigate the same; that said Secretary of the Interior ascertained and determined that the total cost of said water right for said land would be $52.00 per acre and that said sum would be sufficient to return to the reclamation fund the total cost of said project; that said Secretary of the Interior, pursuant to the terms of the Reclamation Act determined and fixed the construction charge for a water right for said land at $52.00 per acre; that said
25 secretary issued a public notice and order fixing the amount of construction charge to be paid by the owner of said land for the amount of water necessary to beneficially and successfully irrigate the same at $52.00 per acre; that said Secretary of the Interior issued a public notice and order, fixing the cost of said irrigation system at $52.00 per acre for the land herein described, a copy of which said notice and order is hereto attached, made a part hereof, and marked "Exhibit B."

VI

That before the owner of the land herein described could procure water for the irrigation of said land from the irrigation system as aforesaid, it was necessary that they make, execute, and deliver to the United States, water-right applications for water to be used in the irrigation of said land; that the then owners of the land herein described executed a water-right application, a copy of which is hereto attached, marked "Exhibit C", and made a part hereof.

VII

That the successive Secretaries of the Interior from and after the time of the issuing of said public notice and order as herein alleged, their representatives and subordinates who were charged with and who actually administered said project, uniformly and at all times construed the Reclamation Act and contracts herein referred to; that the owners of the land herein described and the owners of all other lands in said unit had purchased a sufficient amount of water to

beneficially and successfully irrigate their said land; and that the amount of water required for each tract to beneficially irrigate the same was to be determined by the representatives and subordinates of the Secretary of the Interior, who had the physical charge of the water distribution from a factual investigation made by said representatives and said subordinates by going upon the land from time to time, and from a personal examination of the same, the crops growing thereon, and the water requirements thereof. That pursuant to said practical construction made by the representatives and subordinates of the Secretary of the Interior, and in the method and manner aforesaid, it was determined by the successive Secretaries of the Interior, their representatives, and their subordinates, that 5.56 acre-feet of water per acre per annum was necessary to beneficially and successfully irrigate said land, that pursuant to said practical construction and determination the successive Secretaries of the Interior, their representatives, and their subordinates have for a period of more than twenty years delivered to said land the amount of water necessary to beneficially and successfully irrigate the same, which water has at all times been beneficially used thereon for irrigation purposes.

VIII

That the statute law of the State of Washington, Remington's Revised Statutes, section 7391, which was the law of the State of Washington at the time the water rights herein described were acquired, provides:

26 "The right to the use of water which has been applied to a beneficial use in the State shall be and remain appurtenant to the land or place upon which the same is used."

The decisions of the Supreme Court of the State of Washington uniformly hold that where water is beneficially used upon land for irrigation purposes, the water right so obtained shall be and remain appurtenant to the land where the same is used; that under and by virtue of said statute law and said decisions, the absolute title in fee simple to 5.56 acre-feet of water per acre per annum became and is now vested in the plaintiff, and under the laws of the State of Washington is real estate.

IX

That the United States completed the construction of the irrigation system in said unit and constructed reservoirs of sufficient capacity to beneficially and successfully irrigate all lands within said unit; that after all the costs of the construction of said irrigation system and the construction of reservoirs of sufficient capacity to beneficially and successfully irrigate said land had been ascertained, and after the determination had been made that 5.56 acre-feet of water per acre per annum was necessary to beneficially and successfully irrigate said land had been ascertained, and after the determination had been made that 5.56 acre-feet of water per acre per

annum was necessary to beneficially and successfully irrigate the land herein described, and after said water had been delivered for several years, Congress passed an act providing that no increase of construction charges could be made after the same has been fixed by public notice and order, except by agreement between the Secretary of the Interior and a majority of the water-right applicants; that on September 24th, 1914, the then Secretary of the Interior, Franklin K. Lane, issued a second public notice and order expressly providing that there would be no increase in the construction charges against the land herein described, a copy of said public notice is hereto attached, made a part hereof, and marked "Exhibit D."

X

The plaintiff and his predecessors in title have fully and in every particular complied with the terms of the Reclamation Act and all contracts in connection with said water right, and have fully paid to the United States the sum of $52.00 per acre in full payment of the cost of said water right for said land, and have also paid all operation and maintenance charges assessed against the same. On the 28th day of February 1934, the United States conveyed said water right to this plaintiff; that the plaintiff is now the owner and holder of the fee simple title to said water right, sufficient to beneficially and successfully irrigate said land, to wit: 5.56 acre-feet of water per acre per annum; that said water right is appurtenant to the land herein described, and the absolute fee-simple title to said land and water right is now vested in the plaintiff.

27

XI

That on or about the year 1930, Elwood Mead, Commissioner of Reclamation of the United States, wished to construct the Cle Elum Reservoir at a cost of $3,500,000.00 to store water for the purpose of irrigating lands in the Kittitas Reclamation District, the canal and distribution system in said district being in the process of construction at that time, and also for the purpose of furnishing water to irrigate lands in the Roza and Kennewick divisions of the Yakima project, the construction of which were contemplated at that time; that said Mead ascertained the total cost of said reservoir was $1,000,000.00 more than the amount that would be returned to the reclamation fund from said divisions; that it was necessary to obtain said sum from some source before construction of the Cle Elum Reservoir could be commenced; that said Mead was desirous of constructing said reservoir and knew of no other source from which to obtain said sum except from the Sunnyside unit of the Yakima project; that said Mead, without consulting this plaintiff or other water users in said unit and said district, charged the sum of $1,000,000.00 to said unit and district, and furnished the Secretary of the Interior information that provision had been made for the payment by said unit of said sum.

XII

Thereafter, B. E. Stoutemyer, district counsel, and other officials of the Bureau of Reclamation of the United States attempted to persuade the water right applicants and water users in the Sunnyside unit and in the Sunnyside Valley Irrigation District to authorize the officials of the district to execute a contract with the United States to pay $1,000,000.00 additional construction charge and obligate the plaintiff's land and all other lands in said district to the last faithful acre to pay said sum of $1,000,000.00 additional construction charges; that this plaintiff and no other water right applicants or water users in said unit or said district ever agreed to said increase of construction charges and never agreed to pay the same; that the amount so attempted to be charged against the plaintiff and other water right applicants and water users in said district was equivalent to 35% of the original cost of the water right to the plaintiffs and 35% of the original cost to all other water right applicants and water users in said district.

XIII

That on or about the 11th day of December 1930, Ray Lyman Wilbur, the then Secretary of the Interior, certified to the President of the United States that provision had been made for the repayment to the reclamation fund of the total cost of the Cle Elum Reservoir and that $1,000,000.00 of the cost of construction of said reservoir was to be obtained by rentals from the Sunnyside division of the Yakima project. A copy of this certificate is hereto attached and made a part hereof, marked "Exhibit D."

28 XIV

That thereafter said Elwood Mead and B. E. Stoutemyer agreed with Ray Lyman Wilbur, the then Secretary of the Interior, to force and coerce this plaintiff and other water-right applicants and water users in said unit and said district to authorize said district to enter into contract to pay the additional sum of $1,000,000.00 construction charge, or to force and coerce the plaintiff and other water-right applicants in said unit and said district to sign a water rental application or be deprived of a portion of the water owned by them, and in pursuance of said agreement said Mead, Stoutemyer, and Wilbur caused the Assistant Secretary of Interior to issue a public notice and order, a copy of which is hereto attached and made a part hereof, marked "Exhibit F", and also a public notice and order, a copy of which is hereto attached, made a part hereof, and marked "Exhibit G."

XV

That in pursuance of said agreement and said public notices and orders, copies of which are marked "Exhibits F and G", respec-

tively, said Mead, Stoutemyer, and Wilbur notified this plaintiff and other public-notice water-right applicants and water users in the Sunnyside unit and in said district that the plaintiff and all other public-notice water-right applicants in said unit would be deprived of all water in excess of three acre-feet per acre per annum, unless the said plaintiff and said water-right applicants signed a water-rental application in the words and figures following, to wit:

"WATER RENTAL APPLICATION

"The undersigned applicant requests excess water under public notice issued by the Secretary February 19, 1932, and agrees to pay applicable charges, with 6% interest from December 1, 1932, until paid. He further agrees that water may be withheld from his land after 1932 until such charges are paid. It is understood that advance payment for excess water will be required in 1933 if the 1932 rental charge remains unpaid at that time.

"Witness: "_____ _____,

"_____ _____ *Water user.*"

The plaintiff and all other water-right applicants refused to sign said water-rental application. In the event said public notices and orders are enforced plaintiff will be deprived of 40% of the water, the absolute title to which is vested in him.

XVI

That said Stoutemyer, Mead, and Wilbur agreed with the representatives of other divisions of the Yakima project which were under construction and to be constructed; that said Stoutemyer, Mead, and Wilbur would attempt by means of said water-rental applications to force and coerce the water-right applicants and users including the plaintiff to authorize the officials of the Sunnyside Valley Irrigation District to execute a contract and pay to the United
29 States the additional sum of $1,000,000.00 construction charges, the same being a portion of cost of constructing the Cle Elum Reservoir and which was constructed for said new divisions, and/or to collect from the plaintiff and other water-right applicants and water users in said unit by the subterfuge of the water-rental application said sum of $1,000,000.00 and that in the event said parties were unable to either force or coerce the execution of such a contract between said district and the United States and/or were unable to collect said sum of $1,000,000.00 by means of depriving the plaintiff and other water users of a portion of the water owned by them, and/or compelling the plaintiff and said water-right applicants to sign said water-rental applications and collect said sum; and in the event, said parties were unable by either of said methods to obtain the payment of the sum of $1,000,000.00, said new divisions for whose benefit said Cle Elum Reservoir was constructed would pay the same.

XVII

That three acre-feet of water per acre is not now, never has been, and will not, in the future, be sufficient to beneficially irrigate the land belonging to the plaintiff herein; that a maximum of three acre-feet of water per acre furnished to the land of the plaintiff would enable him to beneficially irrigate about one-half of said land, leaving the other half thereof barren and nonproductive, thereby forcing one-half of the land belonging to the plaintiff to bear construction, maintenance charges, taxes, and assessments on the whole tract of land. If plaintiff attempted to spread a maximum of three acre-feet per acre over the whole tract of land belonging to him, he would not have sufficient water to grow any profitable crop and his land would be completely destroyed for farming purposes, causing him to suffer irreparable loss and damage and which could not be compensated for in an action at law and plaintiff has no adequate or complete remedy at law and effective relief can only be administered in a court of equity.

XVIII

That at all times and on all other Federal reclamation projects and on the Sunnyside unit of the Yakima project prior to October 17th, 1930, which were constructed under the Reclamation Act of 1902, the successive Secretaries of Interior, their subordinates, and their representatives charged with the administration of said project have consistently and uniformly construed the Reclamation Act, contracts similar to exhibit A, and water-right applications similar to exhibit B to mean that the water-right applicant and water user had purchased, had a vested interest prior to full payment, and was the owner of the absolute title in fee simple after full payment of the purchase price for a water right of a sufficient amount of water to beneficially and successfully irrigate each tract of land in said project and that the determination as to the amount required to beneficially and successfully irrigate each tract was to be made by the representatives and subordinates of the successive Secretaries of the Interior who were charged with the distribution and that the same was to be made by said representatives and subordinates upon factual investigation obtained by personal examination of the land and crops growing thereon and water requirements thereof; and in all cases the yardstick used in determining the amount of water, to which the water applicant either had a vested interest in or owned, was beneficial use. That in the administration of the Reclamation Act under contracts similar to the contract herein referred to, no Secretary of the Interior has arbitrarily fixed the amount of water at a certain number of feet, nor taken the question of the determination of the amount of water out of the hands of his representatives and subordinates charged with the physical distribution of the water, nor fixed the maximum amount of water for

each acre in the project, regardless of the water requirements, nor required the execution of a water-rental application as a condition precedent to the use and enjoyment by the water user of a sufficient amount of water to beneficially irrigate his land, except as herein alleged in the Sunnyside unit.

XIX

That since the promulgation of said order and notice of October 17th, 1930, and the public notice order of February 19th, 1932, and since the promulgation of order requiring a water-rental application as a condition precedent to the use and enjoyment of more than three acre-feet of water per acre per annum, it has been definitely ascertained by the defendant that the Cle Elum Reservoir, actually cost $1,003,000.00 less than the estimated cost at the time said Mead charged the sum of $1,000,000.00 to the Sunnyside unit as herein alleged; that since that time the Kittitas reclamation district has entered into contract to purchase from the United States additional water at a total contract price of $2,418,000.00 and the Yakima-Benton Irrigation District, Roza unit has authorized a contract to be entered into at an additional cost over and above what was taken into consideration at the time of the certificate by the Secretary of the Interior to the President as set forth in plaintiff's exhibit H. That on account of said facts, there is no necessity for enforcing said orders and in the event the same are enforced and the Sunnyside Valley Irrigation District or the plaintiff and other water users therein pay said sum of $1,000,000.00, the United States will actually receive more than $1,000,000.00 over the entire cost of the construction of said reservoir.

XX

That the public notices, copies of which are hereto attached, marked "Exhibit E and F" issued by Ray Lyman Wilbur as Secretary of the Interior on October 17th, 1930, and February 19th, 1932, respectively, requiring the execution by the water user of a water-rental application as a condition precedent to the enjoyment and use by the plaintiff of any water in excess of three acre-feet, were not made and issued in good faith or by the exercise of an honest judgment for the reasons herein alleged and set forth,
31 but were arbitrarily and capriciously made and the defendant is arbitrarily and capriciously enforcing the same for the express purpose of coercing and forcing this plaintiff and other water-right applicants and water users in said unit and in said district to authorize said district to enter into contract to pay the United States the sum of $1,000,000.00 construction charge, a part of the cost of constructing the Cle Elum Reservoir, and obligating the last faithful acre of land in said district and the plaintiff's land to pay said sum

and/or to force and coerce the plaintiff and other water-right applicants and water users in said unit and district to execute water-rental applications so that this plaintiff and said water-right applicants and water users will be required to pay to the United States said sum of $1,000,000.00.

XXI

That for the reasons herein alleged and set forth said public notice and order of October 17th, 1930, and said public notice and order of February 19th, 1932, copies of which are hereto attached, marked "Exhibit F and G", and all orders and notices requiring the execution of a water-rental application as a condition precedent to use and enjoyment of more than three acre-feet per acre per annum are null and void and of no effect whatsoever for the reason that the same are in excess of the power and authority vested in the Secretary of the Interior and the enforcement of said public notice and orders are in excess of the authority vested in the defendant; that if said defendant enforces said public notices and orders the plaintiff will be deprived of the use of about 40% of the water right, the absolute title to which is vested in plaintiff pursuant to the terms of the Reclamation Act, contracts, and laws of the State of Washington, without any hearing, and in positive violation of the Constitution and laws of the United States and also in positive violation of the constitution and laws of the State of Washington.

XXII

That the defendant started the enforcement of said public notice and order of October 17th and February 19th, 1932, and the orders requiring a water-rental application to be signed as a condition precedent to the use and enjoyment by the plaintiff in excess of three acre-feet, during the irrigation season of 1934, and the plaintiff is advised and believes and therefore alleges that said defendant, unless he is restrained by an order of this court, will enforce said orders and public notices during the present irrigation season; that said defendant has refused to give any heed to a joint memorial of the State Legislature of the State of Washington in connection with said public notices and orders and has also refused plaintiff and other water-right applicants and water users a right to be heard, and said defendant has wholly refused to consider plaintiff's ownership of said water right and takes the position that there is nothing that the plaintiff can do and that said defendant can arbitrarily and capriciously enforce said public notices and orders and thus compel submission of said water-right applicants and the other
32 water users in said unit and district and collect the sum of $1,000,000 to pay a part of the cost of the construction of the

Cle Elum Reservoir; that there is no other forum or court that has jurisdiction to give this plaintiff any relief against the unlawful acts of said defendants, and if defendant is permitted to enforce said notices and orders the plaintiff's farm will be destroyed for farming purposes and the plaintiff will be driven therefrom and will lose the savings of an entire lifetime.

Wherefore the plaintiff prays:

1. That the defendant, Harold L. Ickes, Secretary of the Interior, be required to appear and make answer to the foregoing amended bill of complaint, but not under oath, answer under oath being hereby expressly waived.

2. That upon the filing of this amended bill or at such time thereafter as shall be fixed by the court, an order be issued herein pendente lite requiring the defendant, as Secretary of the Interior, to suspend the enforcement of the public notice and order, a copy of which is hereto attached, marked "Exhibit F", and to suspend the enforcement of the public notice and order, a copy of which is hereto attached, marked "Exhibit G", promulgated by his predecessor, Ray Lyman Wilbur, and also all notices and orders requiring the execution of a water-rental application as a condition precedent to enjoying the use of more than three acre-feet of water per acre per annum, and restoring to the plaintiff his rights and privileges that he enjoyed prior to the promulgation of said notices and orders, and that upon the hearing of this action an order be entered requiring the defendant, as Secretary of the Interior, to vacate, set aside, and hold for naught the said notices and orders herein referred to, and that the plaintiff be restored to the rights and privileges which he enjoyed prior to the promulgation of said notices and orders.

3. For such other and further relief as shall be just and equitable in the premises.

STEPHEN E. CHAFFEE,
Attorney for the Plaintiff.
PRESTON B. KAVANAGH,
PRESTON C. KING, JR.,
Attorneys for Plaintiff.

[*Duly sworn to by Jacob F. Ottmuller; jurat omitted in printing.*]

NOTE.—Exhibit A, hereto attached, is same as exhibit A attached to original bill of complaint.

33 *Exhibit B to amended complaint*

PUBLIC NOTICES AND ORDERS, SUNNYSIDE PROJECT, WASHINGTON

DEPARTMENT OF THE INTERIOR,
Washington, March 2, 1909.

In pursuance of the provisions of section 4 of the Reclamation Act of June 17, 1902 (32 Stat. 388), notice is hereby given as follows:

Water will be furnished from the Sunnyside project, Washington, under the provisions of the Reclamation Act, for the irrigable land shown on the following township plats—

Willamette meridian:

T. 11 N., R. 20 E.
T. 11 N., R. 21 E.
T. 10 N., R. 21 E.
T. 10 N., R. 22 E.
T. 10 N., R. 23 E.
T. 9 N., R. 22 E.
T. 9 N., R. 23 E.
T. 8 N., R. 24 E.
T. 9 N., R. 24 E.

approved March 2, 1909, by the Secretary of the Interior, and on file in the local land office at North Yakima, Washington.

Water will be furnished in the irrigation season of 1909 for that portion of the land shown upon a list on file in the local land office, the same having heretofore received water from the said Sunnyside project and now being in cultivation.

Water will be furnished for the remaining portions of the irrigable land shown on said plants, from time to time, as announcement shall be made that water is available,

Water-right applications may be made for the irrigable areas shown on the said plats. The time when payments will be due therefor is herein after stated.

The charges which shall be made per acre of irrigable land which can be irrigated by the waters from said irrigation project are in two parts, as follows:

1. The building of the irrigation system $52 per acre of irrigable land, payable in not more than ten annual instalments, each payment not less than $5.20 per acre or some multiple thereof; provided, however, that full payment may be made at any time of any balance remaining due, after certification has been made by the Commissioner of the General Land Office that full and satisfactory compliance has been shown with all the requirements of the law as to residence, cultivation, and reclamation.

2. For operation and maintenance, which will, as soon as the data are available, be fixed in proportion to the amount of water used, with a minimum charge per acre of irrigable land whether water is used thereon or not. The operation and maintenance charge for the irrigation season of 1909, and until further notice, will be 95 cents per acre of irrigable land, for which water is ready in the irrigation season of 1909, whether water is used thereon or not.

The first instalment on account of said charges for the irrigable lands shown on the list on file in the local land office to receive
34 water in the irrigation season of 1909 shall be due March 15, 1909. The second instalment shall be due March 1, 1910. Subsequent instalments shall be due on March 1 of each year thereafter

until fully paid. All charges are payable at the local land office, North Yakima, Washington.

The first instalment of the charges for the irrigable land, for which water is to be subsequently furnished, will be due on March 1 of the year in which water shall be available for said lands, and subsequent instalments shall be due on March 1 of each year thereafter until fully paid.

The first instalment of charges for all lands shown on the said list, for which it is hereby announced that water will be available in the season of 1909, whether or not water-right application is made therefor, or water is used thereon, shall be due and payable as herein provided.

The regulation is hereby established that no water will be furnished in any year until all operation and maintenance charges levied for that year shall have been paid in full. Accordingly no water will be furnished during the irrigation season of 1909 for any lands until the portion of the instalment for operation and maintenance due on March 15, 1909, has been paid, and no water will be furnished in any subsequent irrigation season until the payment has been made of the portion of the instalment for operation and maintenance due March 1 of said year.

Failure to make any two payments of the instalments of charges when due shall render the application subject to cancellation, with forfeiture of all rights under the application, as well as of any moneys already paid thereon.

The charges herein provided for may, for the convenience of the applicants, be paid to the special fiscal agent of the U. S. Reclamation Service, assigned to the Sunnyside project, for transmission to the register and receiver of the local land office, provided the necessary charges for transportation of the cash, as determined by the special fiscal agent, accompany the payment of the water-right charges.

JAMES RUDOLPH GARFIELD,
Secretary of the Interior.

Exhibit C to amended complaint

4–020

DEPARTMENT OF THE INTERIOR

Water-Right Application—Act June 17, 1902 (32 Stat. 388)—
Yakima-Sunnyside Project

U. S. Land office, North Yakima, Washington. Serial No. 04168.
Lands in private ownership.

FEBRUARY 28, 1912.
(Date)

Agnes E. Phillips & T. S. Phillips, her husband, hereinafter called the applicant, hereby applied for a water right under the ——— unit, Yakima-Sunnyside project, subject to the provisions of the act of Congress approved June 17, 1902 (32 Stat. 388),
35

known as the "Reclamation Act" and the rules and regulations established thereunder, the water supplied in pursuance thereof to be used for the irrigation of, and to be appurtenant to, forty (40) acres of irirgable land, as shown on plats approved by the Secretary of the Interior, within the area described as follows: The southwest quarter of the southeast quarter (SW¼ SE¼) being lots 1 to 18, block 1, East Park Addition to Mabton, section 31, township 9, range 23 E., W. meridian, an area of forty (40) acres.

The quantity of water to be furnished hereunder shall be 3 acre-feet of water per annum per acre of irrigable land, as aforesaid, measured at the land; or so much thereof as shall constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided, that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land; provided, however, that if measuring devices are not installed at the land, an increased deemed reasonable by the Reclamation Service official in charge of the project shall be made for losses of water after passing the point of measurement.

The applicant hereby agrees on behalf of himself, his heirs, administrators, and assigns to pay for said water right the estimated cost of construction as fixed by the Secretary of the Interior, namely, the sum of $52.00 per acre for forty acres of irrigable land, in not more than ten (10) annual installments, and to pay promptly when due the annual installments and the operation and maintenance charges duly assessed against said land on account of said water right, each and all of which installments and operation and maintenance charges are hereby made and shall be a lien against the above-described premises, such liens attaching immediately upon the execution hereof and being enforcible as to each and every installments, or charge, or portion thereof at such time as the same shall become due in pursuance of public notice issued by the Secretary of the Interior.

It is further agreed and provided that such lien or liens shall have the full force and effect of a mortgage or deed of trust and vest in the United States all the rights and powers which might be exercised and all benefits which might be claimed by the mortgagee in a real-estate mortgage given to secure payment of a loan or debt, including the right of foreclosure by or on behalf of the United States in any court of competent jurisdiction; and the applicant grants to the United States or its transferee all the rights, powers, and authority in and over the above-described premises which might be exercised by the trustee named in a deed or trust given to secure the payment of a loan or debt.

The applicant further agrees and binds himself, his heirs, administrators, and assigns to pay all taxes and other liens and encumbrances which are now or may hereafter (during the life of the lien herein given to the United States) become a superior lien or encumbrance to that of the United States, and if the applicant, his administrators, executors, heirs, or assigns fail to pay any such tax,

lien, or encumbrance when due, the United States may pay the same and add the amount thereof to the lien held by the United States under this agreement and recover the same.

36 It is further agreed that upon failure of the applicant to comply with the terms of said Reclamation Act and the regulations thereunder, this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

This application must bear the certificate, as hereto attached, of the water users' association under this project, which has entered into contract with the Secretary of the Interior, and the liens which the United States holds against the above-described land for the payment of the building and operation and maintenance charges, may be enforced, at the option of the United States, either directly by the United States or through the medium of the water users' association.

If the Secretary of the Interior has made no contract with a water users' association under this project, the applicant agrees to file, upon his direction, evidence of membership in the water users' association organized under the said project; in default of which this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

And, being duly sworn, the applicant further deposes and says that the post-office address of the undersigned is Mabton, Washington; that the undersigned is a bona fide resident upon said land (or an occupant thereof, residing in the neighborhood, namely, upon section 31, township 9, range 23 E., W. meridian, a distance in a direct line of ------ miles therefrom); that the undersigned holds the following interest in the said tract: Deed as duly shown upon the records of Yakima County, Washington; that no other application, now uncanceled, has been made for a water right under said act of Congress, appurtenant to land now owned or claimed by the undersigned, except as follows: Application no. ------, ------ project, ------, of ------ for ------, section ------, township ------, range ------, ------ meridian, an area of ------ acres and containing ------ acres of irrigable land, as determined by the Secretary of the Interior; and that the present application is made in behalf of the undersigned and not at the instance or for the benefit of any other person or any association or corporation, either directly or indirectly. No Member of or Delegate to Congress, or resident commissioners, after his election or appointment or either before or after he has qualified and during his continuance in office, and no officer, agent, or employee of the Government shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing however herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in

section 116 of the act of Congress approved March 4, 1909 (35 Stat. 1109).

It is further understood and agreed that if the interest of the applicant in said land shall cease and said interest shall be held by a party who is not qualified to apply for or hold a water right under the provisions of the Reclamation Act, this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights acquired thereunder and of all payments made thereon.

37 It is further understood and agreed that the evidence or ownership of this water right shall not be issued by the United States unless fee-simple title to said land is vested in the applicant, or in a qualified assignee thereof, whose aggregate water rights under the said Reclamation Act shall not exceed one hundred and sixty acres, or the maximum limit of area fixed by the Secretary of the Interior, at the time when final payment hereon is due, in default of which this application shall be subject to cancellation by the Secretary of the Interior, with the forfeiture of all rights thereunder and of all moneys paid thereon.

(Sgd.) AGNES E. PHILLIPS,
(Sgd.) T. S. PHILLIPS,
Applicant.

ACKNOWLEDGMENT

STATE OF WASHINGTON,
County of ———:

I, G. W. Paswater, a notary public in and for the State aforesaid, do hereby certify that on this 15 day of April 1912 personally appeared before me Agnes E. Phillips & T. S. Phillips, her husband, to me known to be the individuals described in and who executed the within and foregoing instrument and acknowledged that they signed and sealed the instrument of writing as their free and voluntary act and deed for the uses and purposes therein mentioned.

In witness whereof, I have hereunto set my hand, affixed my official seal, the day and year in this certificate first above written.

[SEAL] (Sgd.) G. W. PASWATER,
Notary Public in and for State aforesaid, residing at Mabton.

My commission expires Dec. 28, 1913.

The above application must be signed and sealed in duplicate, acknowledged before a duly authorized officer in the manner provided by local law, and duly recorded in the records of the county in which the lands are situated.

Filed in the United States land office at North Yakima, Washington, and accepted May 18, 1912, on behalf of the United States.

(Sgd.) HARRY Y. SAINT, *Register.*

If the Secretary of the Interior has entered into a contract with a water users' association under the project, the following certificate must be filled out:

----------, 191__.

I hereby certify that the applicant for this water right has duly subscribed (or is the successor in interest of one who has subscribed) for the stock of this association for the lands described herein, and that all assessments levied against said stock by said association have been fully paid up to date.

[CORPORATE SEAL] _____ _____,

Secretary _____ Water Users' Association.

38 OATH OF DISINTERESTEDNESS

(Section 3745, U. S. Revised Statutes)

I do solemnly swear that the copy of contract hereunto annexed is an exact copy of contract made by me personally with Agnes E. Phillips and T. S. Phillips, her husband, that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said Agnes E. Phillips and T. S. Phillips, her husband, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided.

(Sgd.) HARRY Y. SAINT, *Register.*

Sworn to and subscribed before me at North Yakima, Washington, this 18th day of May 1912.

(Sgd.) A. C. STEINMAN, *Receiver.*

Exhibit D to amended complaint

GENERAL PUBLIC NOTICE FOR ALL RECLAMATION PROJECTS

DEPARTMENT OF THE INTERIOR,
Washington, September 24, 1914.

1. In pursuance of the provisions of the Reclamation Extension Act of August 13, 1914 (Public, No. 170), notice is hereby given that the charges for a water right for lands under the several projects and units thereof for which public notice or notices have heretofore issued are of two kinds: (1) A charge per irrigable acre for the building of the irrigation system termed as construction charge; (2) an annual charge for each acre-foot of water delivered, payable at such time as may hereafter be fixed, for the operation and maintenance of the project or a unit thereof. Each acre of irrigable land, whether irrigated or not, will be charged with a minimum operation

and maintenance charge based upon the charges for delivery of not less than one acre-foot of water.

2. The amount of the construction charge per irrigable acre for lands for which entry under the provisions of the Reclamation Act of June 17, 1902 (32 Stat. 388), or water-right application has heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed "the building charge", and will not be increased, except as provided in said Reclamation Extension Act.

3. Any person whose land or entry has heretofore become subject to the terms and conditions of the reclamation law may secure the benefits of the extension of the period of payments, provided for in the said Reclamation Extension Act, by notifying the Secretary of the Interior of his acceptance of all the terms and conditions of said act. Such notice of acceptance shall be in the form prescribed by the Secretary, and may be obtained from the project manager on application. Such acceptance must be filed with the project manager within six (6) months from the date of this public notice. The construction charge, for the lands or entries of persons so accepting the benefits of the period of extension, or so much thereof as may
39 remain unpaid at the time of the filing said notice of acceptance, must be paid in not more than twenty (20) annual instalments; the first of which instalments will be due December 1, 1914. The first four of such annual instalments shall be each two (2) per centum and the next two instalments each four (4) per centum and the remaining fourteen instalments each six (6) per centum of the said construction charge, or of the portion thereof remaining unpaid at the time of filing said notice of acceptance as the case may be. The whole or any part of the construction charge may be paid within any shorter period than 20 years if so desired.

4. The method of determining the annual operation and maintenance charge, the penalties for failure to pay the construction charges and the operation and maintenance charges when due, the reclamation requirements, and the discount allowed for prepayment of the operation and maintenance charges are prescribed by the said Reclamation Extension Act.

FRANKLIN K. LANE,
Secretary of the Interior.

Exhibit E to amended complaint

DECEMBER 11, 1930.

MY DEAR MR. PRESIDENT:

The acts of Congress of March 7, 1928 (45 Stat. 200, 228, and of March 4, 1929, 45 Stat. 1562, 1592), make appropriations of $500,000 and $1,000,000, respectively, for the construction of Cle Elum Dam, Yakima project. By act of May 14, 1930, 46 Stat. 279, 308, the

unexpended balances of these appropriations were made available during the fiscal year 1931.

Section 4 of the act of June 25, 1910, provides, in effect, that after the date of that act no irrigation project to be constructed under the act of June 17, 1902, 32 Stat. 388, and amandatory acts shall be undertaken until the project shall have been recommended by the Secretary of the Interior and approved by the direct order of the President.

Subsection B, section 4, of the act of December 5, 1924 (43 Stat. 702), provides as follows:

"That no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development, and he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States."

As the sixth and last of a series of dams for regulating and storing the waters of the Yakima River and tributaries, it is proposed to construct on earth- and gravel-fill storage dam located on the Cle Elum River, a tributary of the Yakima River. This dam is to have a maximum height of about 125 feet, a crest length of 700 feet, and a volume of about 450,000 cubic yards of material, forming a reservoir with an area of 4,680 acres for storage of 435,000 acre-feet of water for the irrigation of lands under the Yakima project. The cost of the storage dam is estimated at $2,800,000, of the reservoir right-of-way $300,000, and the flowage rights and contingencies $400,000, making the total estimated cost $3,500,000. This constitutes a part of the storage system of the project, the total actual and estimated cost of which is $11,558,000. Of this amount the return of $6,996,000 is guaranteed under existing contracts, leaving a balance of $4,562,000, the repayment of which will be provided for as follows: Five hundred eighty thousand dollars is to be repaid by the Wapato Indian Reservation, $1,000,000 by rentals from the Sunnyside division of the Yakima project, and the remainder by the Roza and Kennewick divisions of the project.

The development is believed to be feasible, the project is adaptable for actual settlement and farm homes, and the cost of construction of the dam will in all probability be returned to the United States.

It is recommended that this work be approved, and that the necessary authority be issued to this Department to make contracts for the construction of the dam and to proceed with the work.

Very truly yours,

(Signed) RAY LYMAN WILBUR.

Exhibit F to amended complaint

OCTOBER 17, 1930.

NOTICE AND RULES AND REGULATIONS AS TO WATER DELIVERIES IN THE SUNNYSIDE VALLEY IRRIGATION DISTRICT FOR THE YEAR 1931 AND SUBSEQUENT YEARS AND DETERMINATION OF AMOUNT OF WATER REQUIRED

The water applications and water-right contracts which determine the limit of the individual water rights in the Sunnyside Valley Irrigation District provide in most cases—

(A) For the delivery of three (3) acre-feet of water or so much thereof as is necessary for beneficial use in years of ordinary run-off in Yakima River, with a provision for a pro rata reduction in years of unusual drought or low water.

(B) Some of such application or contracts provide for delivery of 3 acre-feet subject to a proviso, "that the amount of water furnished shall be limited to the amount beneficially used upon said lands."

(C) Still other applications or contracts provide for delivery of 3 acre-feet per annum per acre, "or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States" and subject to the proviso "that the amount of water furnished shall be limited to the amount beneficially used upon such lands" and the further provision "that the United States shall not be responsible for the failure to supply water under this contract caused by insufficient supply of water in Yakima River due to hostile diversion or unusual drought."

The amount of water required to grow a successful crop depends largely upon the amount of labor and money expended in preparing the land, providing equipment for economical use of water and caring for the water to avoid waste. Cheap storage sites are available on the Yakima River, particularly at Lake Cle Elum, and
41 it may be cheaper to provide additional storage than to provide the necessary labor and equipment to secure an economical use of water. If the purchase of additional storage is preferred to strict economy in the use of the existing water supply, the opportunity is available to provide additional storage by participation in the construction of another reservoir.

Owing to the fact that the canal system of the Kittitas division of the Yakima project has not heretofore been completed and the lands of that division have not heretofore been ready to use the stored water to which they are entitled, it has been possible to allow the water users of the Sunnyside Valley Irrigation District the temporary use of water in excess of the amounts specified in their respective contracts and water applications, but the Kittitas division is now beginning the use of the water to which it is entitled under the contract between the Kittitas Reclamation District and the United States, and it has now become necessary to limit water deliveries in the

Sunnyside Valley Irrigation District to the amounts specified in the contracts and water applications applicable to the lands of that district.

In order that all water users in the Sunnyside Valley Irrigation District may know in advance that economy in the use of water will hereafter be necessary, and be prepared to take care of the water and use it to the best advantage, notice is hereby given that as to all lands except those above referred to in paragraph (C), during the year 1931 and subsequent years, until further notice, water deliveries in that district will be limited to three (3) acre-feet per irrigable acre per year as specified in the said contracts and applications, except in years of unusual drought or low water when it will be necessary to limit deliveries to a somewhat smaller amount as provided for in said contracts applicable to the lands of the district; provided, however, that so long as there is surplus stored water available not required to meet the contract obligations of the United States to other parties, water in excess of three acre-feet may be rented by water users of the Sunnyside Valley Irrigation District of the classes referred to above as "A" and "B" whose rights are limited under their applications and contracts to 3 acre-feet. The water rental charge for such extra water in excess of 3 acre-feet, used during the irrigation season of 1931, will be one dollar and fifty cents ($1.50) per acre-foot, and the rental rate will be announced annually for subsequent seasons. All money collected for the rental of such extra water will be applied toward the payment of the unsecured portion of the construction costs of the reservoir system of the Yakima project.

The determination "by the authorized agent of the United States" of the amount of water required "to successfully irrigate" the lands subject to the above quoted clause referred to in paragraph C will be made during the year 1931 and deliveries to such lands in 1932 and subsequent years will be governed by such determination except in years of unusual drought or low water when it will be necessary to limit deliveries to a somewhat smaller amount as provided for in said contracts applicable to such lands.

(Signed) JOHN H. EDWARDS,
Assistant Secretary of the Interior.

42 *Exhibit G to amended complaint*

60865 (No. 31)

United States Department of the Interior, Bureau of Reclamation, Sunnyside Division, Yakima Project

PUBLIC NOTICE OF ANNUAL OPERATION AND MAINTENANCE CHARGES

(Act of June 17, 1902, 32 Stat. 388, as amended or supplemented)

WASHINGTON, D. C., *February 19, 1932.*

1. Operation and maintenance charges for project lands.—For the purpose of equitably determining operation and maintenance charges

for the lands of the Sunnyside division, Yakima project, Washington, notice is hereby given that for the irrigation season of 1932, and thereafter until further notice, each acre of irrigable land subject to public notice rates in said division, whether water is used or not, shall be charged with a minimum operation and maintenance charge of one dollar and fifty cents ($1.50), which will permit delivery of not more than the amounts per irrigable acre to which such lands are entitled under notice and regulations of the Secretary, dated October 17, 1930, and in accordance with the following schedule per irrigable acre:

Monthly schedule of deliveries:

April	13.3 percent.
May	15.0 "
June	18.3 "
July	18.3 "
August	16.7 "
September	11.7 "
October	6.7 "

The above deliveries will be contingent on beneficial use, as determined by the project superintendent.

2. Charges for water rental for lands subject to public notice.—The lands of the Sunnyside division, Yakima project, Washington, under public notice, have been divided by the Sunnyside Valley Irrigation District into three classes, according to water requirements, namely, (a), (b), and (c), and a map showing such classification is on file in the office of the project superintendent and in the office of the irrigation district. For additional water (if available from either storage or natural flow) delivered during the months of June, July, and August in excess of the monthly schedule of the preceding paragraph, the rental charge, as provided in notice of October 17, 1930, will be as follows:

Class A—$1.50 per acre-foot.
Class B— .75 per acre-foot.
Class C— .50 per acre-foot.

When available, water in excess of this schedule will be delivered during the other months of the season without extra charge.

3. Charges for rental water for lands under supplemental water-right contracts.—For lands receiving water under said division
43 of said project, by virtue of certain supplemental water-right contracts with the United States, under the provisions of which a minimum operation and maintenance charge is fixed which permits the delivery of amounts of water, determined in accordance with the public notice of October 17, 1930, a rental charge of one and 50/100 dollars ($1.50) per acre-foot for additional water (if available from storage or natural flow) delivered during each of the months of June, July, and August in excess of the said determined amounts will be made. When available, water in excess of the determined amounts will be delivered during the other months of the season without extra charge.

4. Water-rental charges for lands outside the project.—For water which may be furnished lands outside the limits of the said division of said project the charge shall be one dollar ($1.00) per acre-foot for the irrigation season of 1932, and thereafter until further notice.

5. Water rights secured with lands, the title to which has passed to the several irrigation districts and the farming of which is now abandoned, may be used upon types or classes of land specified by the irrigation districts, under approved rules and regulations, where the same is not now covered by district contract, such designation to be made within thirty (30) days after date of this public notice.

6. Time of payment.—All water charges announced herein are due and payable on December 31, following the irrigation season.

Jos. M. Dixon,
First Assistant Secretary.

In Supreme Court of District of Columbia

Motion to dismiss

Filed June 7, 1935

* * * * * * *

Comes now Harold L. Ickes, Secretary of the Interior, the defendant in the above-entitled cause, and moves to dismiss the above-entitled cause and the plaintiff's amended bill of complaint in said cause upon each and every of the following grounds:

1. That the defendant has no individual interest in the controversy, and the relief sought against him is in his official capacity only, as a representative of the Government, which alone is to be affected by any decree herein, wherefore this suit, as manifest upon the face of the amended bill of complaint, is essentially and substantially a suit against the United States, beyond the jurisdiction of the court.

2. That the amended bill of complaint and the exhibits attached thereto and made a part thereof show that this suit is brought on contracts to which the United States is a party and that the decree prayed for would affect the interest of the United States in said contracts and the property of the United States, whereof the court is without jurisdiction.

3. That it is manifest, upon the face of the amended bill of complaint, that the plaintiff seeks, in substance and effect, a decree for specific performance by the United States of alleged obligations under its contracts, whereof the court is without jurisdiction.

44 4. That it appears by the amended bill of complaint that the plaintiff has a plain, adequate, and complete remedy at law, if he has any right.

5. That it is manifest, upon the face of the amended bill of complaint, that the relief prayed for therein would necessarily involve continued and detailed supervision by this court, for a long and in-

definite period, of the performance of contract duties that require the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

Wherefore, the defendant, Harold L. Ickes, Secretary of the Interior, prays that the above-entitled cause be dismissed, that the amended bill of complaint in said cause be dismissed, and that he be permitted to go hence without day, be for nothing held and recover of the plaintiff his costs.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
J. KENNARD CHEADLE,
Assistant Solicitor, Department of the Interior,
HOWARD R. STINSON,
Assistant Solicitor, Department of the Interior,
Attorneys for Defendant.

Service accepted and copy received June 7th, 1935.

STEPHEN E. CHAFFEE,
One of Attys. for Plff.

In Supreme Court of District of Columbia

Memorandum opinion

Filed June 14, 1935

* * * * * * *

In sustaining the motions in these cases for leave to file the amended bills accompanying the motions I necessarily considered the questions raised by the motions to dismiss.

My opinion has not been changed by the argument and briefs in behalf of the motions, and the motions to dismiss will be overruled, with leave to the defendant to answer within thirty days.

BAILEY, *J.*

In Supreme Court of District of Columbia

Order denying motion to dismiss amended bill of complaint

Filed June 24, 1935

* * * * * * *

The above-entitled cause coming on to be further heard on defendant's motion to dismiss the amended bill of complaint herein, and the parties thereto having appeared in open court by their respective attorneys, and the arguments of said attorneys on said motion having been heard, the matter having been submitted, and the court being fully advised in the premises, and having denied said motion to dismiss; it is hereby

Ordered, adjudged, and decreed this 24th day of June 1935 that the defendant's motion to dismiss plaintiff's amended bill of com-
45 plaint be, and the same is hereby, denied, with leave to the defendant to answer within thirty days.

JENNINGS BAILEY, *Justice.*

From the foregoing order the defendant, by his attorney of record in open court, notes a petition to the United States Court of Appeals for the District of Columbia for the allowance of a special appeal; whereupon it is hereby further ordered that further proceedings in this cause be stayed pending disposition of the aforesaid petition for a special appeal; and if said petition be granted, then pending disposition of the special appeal. If said petition or said special appeal be finally decided adversely to the defendant herein, the defendant shall have leave to answer within thirty days from such final decision.

JENNINGS BAILEY, *Justice.*

Acceptable as to form: No objection:

PRESTON B. KAVANAGH,
One of Attorneys for Plaintiff.

In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order allowing special appeal

Filed July 23, 1935

On consideration of the petition for the allowance of a special appeal in the above entitled cause from the order of the Supreme Court of the District of Columbia entered therein on June 24, 1935, by Mr. Justice Jennings Bailey,

It is ordered by the court that the petition be and it is hereby granted and a special appeal allowed as prayed.

Per Mr. Chief Justice MARTIN.

JULY 22, 1935.
A true copy.
Test:
[SEAL]

HENRY W. HODGES, *Clerk.*
By MONCURE BURKE, *Deputy clerk.*

46 In Supreme Court of District of Columbia

Assignment of errors

Filed July 26, 1935

* * * * * * *

Now comes the defendant, Harold L. Ickes, Secretary of the Interior, by his attorneys, and assigns as errors of the Supreme Court of the District of Columbia in the above-entitled cause the following:

1. The court erred in denying defendant's motion to dismiss the amended bill of complaint.,

2. The court erred in signing and entering the order denying the motion to dismiss the amended bill of complaint.

3. The court erred in holding that the suit of plaintiff was not brought against the United States.

4. The court erred in not granting the motion to dismiss the amended bill of complaint and in not dismissing the amended bill of complaint for lack of jurisdiction.

5. The court erred in not holding that the defendant has no individual interest in the controversy and that the relief sought against him is in his official capacity only, as an officer of the United States, which alone is to be affected by any decree herein, wherefore the suit, as manifest upon the face of the amended bill of complaint, is essentially and substantially a suit against the United States, beyond the jurisdiction of the court.

6. The court erred in not holding that the amended bill of complaint and the exhibits attached thereto and made a part thereof show that the suit is brought on contracts to which the United States is a party and that the decree prayed for would effect the interests of the United States in said contracts and the property of the United States, wherefore the court is without jurisdiction.

7. The court erred in not holding that the amended bill of complaint prays, in substance and effect, for a decree for specific performance by the United States of alleged obligations under its contracts, whereof the court is without jurisdiction.

8. The court erred in not holding that it appears by the amended bill of complaint that the plaintiff has a plain, adequate, and complete remedy at law, if he has any right.

9. The court erred in not holding that the relief prayed for in the amended bill of complaint would necessarily involve continued and detailed supervision by this court, for a long and indefinite period, of the performance of contract duties that require the exercise of personal judgment and technical skill, wherefore said bill lacks equity.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
FREDERICK BERNAYS WIENER,
Assistant Solicitor, Department of the Interior,
JACKSON E. PRICE,
Assistant Solicitor, Department of the Interior,
Attorneys for the Defendant.

47 Service of a copy of the above assignment of errors acknowledged this 26th day of July 1935.

PRESTON B. KAVANAGH,
One of the Attorneys for the Plaintiff.

Memorandum

August 13, 1935

Time to file transcript of record in Court of Appeals extended to September 16, 1935.

In Supreme Court of District of Columbia

Designation of record

Filed July 26, 1935

* * * * * * *

The court will please prepare a transcript of the record in the above-entitled cause and include therein the following:

1. Bill of complaint.
2. Order of the court permitting amendment to the bill of complaint.
3. Amendment to bill of complaint.
4. Motion to dismiss bill of complaint, as amended.
5. Memorandum opinion of Mr. Justice Bailey granting motion to dismiss bill of complaint, as amended.
6. Order of the court granting motion to dismiss and dismissing bill of complaint, as amended.
7. Motion for leave to amend.
8. Memorandum opinion of Mr. Justice Bailey granting motion for leave to amend.
9. Order granting motion for leave to amend and permitting plaintiff to file proposed amended bill of complaint.
10. Amended bill of complaint.
11. Motion to dismiss amended bill of complaint
12. Memorandum opinion of Mr. Justice Bailey overruling motion to dismiss amended bill of complaint.
13. Order denying motion to dismiss amended bill of complaint.
14. Order showing allowance of special appeal by Court of Appeals.
15. Assignment of errors.
16. This designation.

NATHAN R. MARGOLD,
Solicitor, Department of the Interior,
FREDERICK BERNAYS WIENER,
Assistant Solicitor, Department of the Interior,
JACKSON E. PRICE,
Assistant Solicitor, Department of the Interior,
Attorneys for the Defendant.

Service of a copy of the above designation of record acknowledged this 26th day of July 1935.

PRESTON B. KAVANAGH,
One of the Attorneys for the Plaintiff.

48 [Clerk's certificate to foregoing transcript omitted in printing.]

49 In United States Court of Appeals

[Title omitted.]

Minute entry

January 7, 1936

The argument in the above entitled causes was commenced by Mr. F. B. Wiener, attorney for appellant, and was continued by Mr. Stephen E. Chaffee, attorney for appellees, and was concluded by Mr. F. B. Wiener, attorney for appellant.

50 In the United States Court of Appeals for the District of Columbia

No. 6541

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

v.

MAZINE Z. FOX AND JOSIE R. FOX, HIS WIFE, APPELLEES

No. 6542

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

v.

PHILIP LOUIS PARKS AND OLLIE D. PARKS, HIS WIFE, APPELLEES

No. 6543

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

v.

JACOB F. OTTMULLER, APPELLEE

Appeal from the Supreme Court of the District of Columbia

Decided June 8, 1936

Nathan R. Margold, Frederick Bernays Wiener, Jackson E. Price, of Washington, D. C., for Appellants.

Preston B. Kavanagh, P. C. King, Jr., of Washington, D. C., and Stephen E. Chaffee, of Sunnyside, Washington, for Appellees.

BEFORE MARTIN, Chief Justice; ROBB, VAN ORSDEL, GRONER, and STEPHENS, Associate Justices

Opinion

VAN ORSDEL, Associate Justice. These are three special appeals by the Secretary of the Interior, Harold L. Ickes, from orders of the

Supreme Court of the District of Columbia denying his motions to dismiss amended bills in equity brought by appellees, plaintiffs below, to restrain the defendant Ickes, as Secretary of the Interior, from the enforcement of certain public notices issued by his predecessor, in office, Ray Lyman Wilbur, limiting plaintiffs' water right appropriations in the Sunnyside Unit of Yakima Project, a Federal Reclamation Project in the State of Washington, to an amount of water much less than the rights and privileges which plaintiffs enjoyed prior to the promulgation of the notices and orders in question.

Pursuant to the terms of the Reclamation Act of June 17, 1902, 32 Stats. 328, as amended U. S. C., T. 43, Chap. 12, the United
51 States undertook the construction and operation of the Yakima Project. Acting under the law, the United States purchased from the Washington Irrigation Company the Sunnyside Canal, water appropriations and irrigation system used in connection therewith. In addition to the rights thus procured, the United States secured appropriations from the Yakima river system, pursuant however to the express provisions therefor in the laws of the State of Washington, and provided storage for the waters thus appropriated from the state in reservoirs constructed, owned, and operated by the United States. Plaintiffs were appropriators and owners of water rights in the Sunnyside Canal from the Washington Irrigation Company long prior to its purchase by the United States. Plaintiffs were required by the government, as a condition of procuring water for irrigation of their lands, to execute and deliver to the United States certain water-right obligations. In consideration of procuring these rights, plaintiffs were required to pay to the government of the United States "the sum of $10.00 per acre for the benefits to be derived from said project of the United States", which amount it is alleged has been fully paid and any claims therefor from the government, or liens thereunder, have been fully satisfied and discharged.

It is important at this point to ascertain the nature of the water-rights purchased from the United States by plaintiffs or their predecessors as stated in the several applications. In the Fox case: "The measure of the water right for said land is that quantity of water which shall be beneficially used for the irrigation thereof, but in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the project manager or other proper officer of the United States, or of its successors in control of the project, during the irrigation season for the irrigation of lands under said unit." In the Parks case the measure of the water right purchased is fixed in the application as follows: "The amount of water to be furnished hereunder shall be three (3) acre-feet of water per annum per acre measured at the land, or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States, and the water shall be used only to irrigate said lands

and for domestic purposes incident thereto; provided, that the amount of water furnished shall be limited to the amount beneficially used upon such lands." In the Ottmuller case the water right application provided: "The quantity of water to be furnished thereto shall be three (3) acre-feet of water per annum per acre of irrigable land as aforesaid, measured at the land; or so much thereof as did constitute the proportionate share per acre from the water supply actually available for the lands under said project; provided, that the supply furnished shall be limited to the amount of water beneficially used on said irrigable land."

Plaintiffs, in their amended bills of complaint, base their rights to the use of water primarily on the rights acquired by them or their predecessors by purchase from the Washington Irrigation Company, under which it is alleged there was furnished by the
52 company and beneficially used upon the lands in question: In the case of Parks, 6 acre-feet of water per acre per annum; in the case of Ottmuller, 5.56 acre-feet of water per acre per annum; and in the case of Fox, 4.84 acre-feet of water per acre per annum; which rights under the laws of the State of Washington became appurtenant to the lands and is real estate. (Rem. R. S. Wash. Sec. 7391.)

It is alleged by the plaintiffs in their respective bills that the United States completed the construction of the irrigation unit, constructed reservoirs of sufficient capacity to beneficially and successfully irrigate all lands within said unit, and a determination had been made that the respective amounts originally acquired by the plaintiffs of water per acre per annum was necessary to beneficially and successfully irrigate the lands, and after the delivery of the water for several years and its beneficial use Congress passed an Act (38 Stat. 687; 43 U. S. C. A., Sec. 469), providing: "No increase in the construction charges shall, after August 13, 1914, be made after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase." This restriction was confirmed on September 24, 1914, by Franklin K. Lane, then Secretary, in a public notice, as follows: "The amount of the construction charge per irrigable acre for lands for which entry under the provisions of the Reclamation Act of June 17, 1902 (32 Stat. 388), or water-right application has heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed 'the building charge', and will not be increased, except as provided in said Reclamation Extension Act."

The statute law of the State of Washington provides: "The right to the use of water which has been applied to a beneficial use in the State shall be and remain appurtenant to the land or place upon which the same is used." (Remington's R. S., Sec. 7391.) In view of this statute, the successive Secretaries of the Interior construed the contracts as conveying to each purchaser a sufficient amount of

water to beneficially and successfully irrigate his land. Indeed, this was imperative under Sec. 8 of the Reclamation Act (43 U. S. C. A., Sec. 372), which provides: "The right to the use of water acquired under the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

It is alleged that "it was determined by the successive Secretaries of the Interior, their representatives, and their subordinates", that in the case of Parks, 6 feet of water per acre per annum; in the case of Ottmuller, 5.56 feet; and in the case of Fox, 4.84 acre-feet "was necessary to beneficially and successfully irrigate said land; that pursuant to said practical construction and determination the successive Secretaries of the Interior, their representatives and subordinates have for a period of more than 20 years delivered to said land the amount of water necessary to beneficially and successfully irrigate the same, which water has at all times been beneficially used thereon for irrigation purposes."

It is alleged that in the year 1930, Elwood Mead, Commissioner of Reclamation of the United States, recommended the construc-
53 tion of the Cle Elum Reservoirs at a cost of $3,500,000 for the purpose of storing water for the irrigation of lands in Kittitas Reclamation District, and also for the purpose of supplying water for the irrigation of lands in the Roza and Kennewick divisions of the Yakima Project. Mead, it is alleged, ascertained that the cost of the reservoir would be $1,000,000 more than the amount that would be returned to the reclamation fund from these divisions. It was necessary, therefore, before the commencement of reservoir construction that a source should be ascertained from which the $1,000,000 could be obtained. It is alleged that Mead accordingly "without consulting these plaintiffs or other water users in said unit in said District, charged the sum of $1,000,000 to said unit in said District and furnished the Secretary of the Interior information that provision had been made for the payment by said unit of said sum."

It is also alleged that thereafter Mead and one Stoutemyer, District Counsel, and Secretary Wilbur, in order to compel the plaintiffs and other water users to contract to pay the sum of $1,000,000, caused the Assistant Secretary of the Interior on October 17, 1930, to issue an order which, among other things, provided: "The water applications and water-right contracts which determine the limit of the individual water rights in the Sunnyside Valley Irrigation District provided in most cases—

(A) For the delivery of three (3) acre-feet of water or so much thereof as is necessary for beneficial use in years of ordinary run-off in the Yakima River, with a provision for pro rata reduction in years of unusual drought or low water.

(B) Some of such applications or contracts provide for delivery of 3 acre-feet subject to a proviso 'that the amount of water furnished shall be limited to the amount beneficially used upon said lands.'

(C) Still other applications or contracts provide for the delivery of 3 acre-feet per annum per acre, 'or as much more water as will be required to successfully irrigate the land, the amount so required to be determined by the authorized agent of the United States', and subject to the proviso 'that the amount of water furnished shall be limited to the amount beneficially used upon such lands', and the further provision 'that the United States shall not be responsible for the failure to supply water under this contract caused by insufficient supply of water in the Yakima River, due to hostile diversion or unusual drought.'"

After a statement by the Assistant Secretary on the economical use of water for irrigation to avoid waste, and the additional storage capacities that would be supplied, and the statement that heretofore due to the fact that the Kittitas division of the Yakima project had not been completed, it had been possible to permit water users in the Sunnyside Valley irrigation District to use water in excess of amounts specified in their contracts and applications, it was ordered: "In order that all water users in the Sunnyside Valley Irrigation District may know in advance that economy in the use of water will hereafter be necessary, and be prepared to take care of the water and use it to the best advantage, notice is hereby given that as to all lands
except those above referred to in paragraph (C), during the
54 year 1931 and subsequent years, until further notice, water
deliveries in that district will be limited to three (3) acre-feet per irrigable acre per year, as specified in the said contracts and applications, except in years of unusual drought or low water, when it will be necessary to limit deliveries to a somewhat smaller amount as provided for in said contracts applicable to the lands of the District; provided, however, that so long as there is surplus stored water available not required to meet contract obligations to the United States to other parties, water in excess of three acre-feet may be rented by water users of the Sunnyside Valley Irrigation District of the classes referred to above as 'A' and 'B', whose rights are limited under their applications and contracts to 3 acre-feet. The water-rental charge for such extra water in excess of 3 acre-feet, used during the irrigation season of 1931, will be one dollar and fifty cents ($1.50) per acre-foot, and the rental rate will be announced annually for subsequent seasons. All money collected for the rental of such extra water will be applied toward the payment of the unsecured portion of the construction costs of the reservoir system of the Yakima project."

A further notice and order was given by the First Assistant Secretary of the Interior on May 5, 1932, in which a classification of the lands was made as those entitled to three acre-feet per acre, 3.5 acre-feet per acre, and four acre-feet per acre. This classification was made by one W. W. Johnson in a report of February 1932. It was then ordered that water users under these various classifications "except in years of unusual drought or low water, when water deliveries to said lands may be limited to less than the quantities herein

designated, the amount indicated for that class will constitute the required water deliveries to said land"; and that water deliveries beginning with the irrigation season of 1932 "in excess of the above determined quantity per acre, will be suggested to water-rental charges at rates established in public notice for the irrigation season of 1932 and in subsequent public notices."

These orders amounted to notice to Fox and Ottmuller that they would be deprived of all water rights in excess of three acre-feet of water per annum, and that Parks would likewise be deprived of all water rights in excess of 3½ acre-feet per annum, unless plaintiffs would sign a new water rental application which they, together with all other water-rights applicants, refused to sign. This application provided as follows: "The undersigned applicant requests excess water under public notice issued by the Secretary February 19, 1932, and agrees to pay applicable charges, with 6% interest from December 1, 1932, until paid. He further agrees that water may be withheld from his land after 1932 until such charges are paid. It is understood that advance payment for excess water will be required in 1933, if the 1932 rental charge remains unpaid at that time."

We are confronted again by the usual contention that this is a suit against the United States, and as such cannot be maintained. This is urged on the theory that the action is one to require the specific performance of a contract with the United States. This is not an action for specific performance. It is an action to restrain the Secretary of
55 the Interior from enforcing the alleged illegal orders issued by that officer and his predecessor in office in his capacity as the administrative agent of the government for the construction of irrigation works and the disposition of the same under the Reclamation Act (38 Stat. 690, Sec. 15; 43 U. S. C. A., Sec. 373). The suit, therefore, is one against an agent of the government and not against the government itself, since no complaint is here made by the plaintiffs of the existing contracts between them and the government. The validity of the contracts between the government and the plaintiffs is not here in issue. The question is whether or not the orders promulgated amount to a valid and enforceable extension of the terms of the contract. If not the orders will be determined as unenforceable and the contracts will remain valid as if the orders had never been issued.

This brings us to the consideration of the authority of the Secretary to issue the orders here in question. The water rights here involved were primarily derived through the contracts of the plaintiffs or their predecessors with the Washington Irrigation Company. Under that authority, and in conformity with the laws of the State of Washington, the plaintiffs acquired sufficient water, beneficially used, to irrigate their lands, and these rights were not subsequently modified to any extent by the contracts entered into with the government after the government had acquired the rights of the Washington Irrigation Company. While in two of the contracts here in question the amount is fixed at 3 and one at 3½ feet per acre, this

seems to have been put in as a minimum amount, since there was a further qualification permitting of the use of sufficient water to beneficially and successfully irrigate their lands. This is the legal measure of right to use fixed by the laws of the tSate of Washington and by the Reclamation Act. This amount had been fixed through prior application and use of the water at six feet per acre in the case of Parks, 4.84 feet per acre in the case of Fox, and 5.56 feet per acre in the case of Ottmuller. This amount was found to be necessary to beneficially and successfully irrigate the land; and under Section 7390 Rem. Rev. Stat. of Washington, "the right to the use of water which has been applied to beneficial use in the State shall be and remain appurtenant to the land or place upon which the same is used."

Under the Reclamation Act the United States, in putting in an irrigation enterprise, stands in the same position with relation to the State as a private individual. The waters belong to the State, and the United States never acquires any title therein any more than a private appropriator.

It is settled irrigation law that mere diversion and storage of water does not constitute an appropriation. Before there can be an appropriation the water must be applied to a beneficial use. Highland Ditch Company v. Union Reservoirs Company, 127 Pac. 1025. In Paine Irrigation District v. Board of Commisisoners, 236 Fed. 790, the court, considering constitutional and statutory provisions similar to those of the State of Washington, held that under the Constitution and statute relating to water rights, as construed by the Supreme Court of the State, no property right can be acquired in the use of water until it is applied to a beneficial use. The owner of the carrying ditch gets no title or right to the use of the water and has
56 no property in it subject to disposal, but such property right of disposal is in him who applies the water to beneficial use.

It is clear, therefore, that the United States under the proceedings provided in the Reclamation Act acquires no title to the water. It is merely a carrier and distributor of the water, and the only title acquired which consists only of a right of use is in the appropriator who applies the water to a beneficial use. To proceed under the Reclamation Act the United States must make application for a permit to appropriate the waters and to distribute it for beneficial purposes. The state does not surrender its right to control its use. The 1,000 cubic feet appropriated in 1891 was appropriated by the application of the water to beneficial use, and under such circumstances the water becomes a part and parcel of the land and is appurtenant thereto. This rule was recognized in the Reclamation Act (43 U. S. C. A., Sec. 372), where it is specifically provided that the water right is appurtenant to the lands irrigated.

Secretary Garfield in 1909, pursuant to 43 U. S. C. A., Sec. 419, made a finding as to the cost of the irrigation system in addition to the purchase price paid the Washington Irrigation Company, and fixed the price at $52.00 per acre, which sum would return to the

Reclamation fund the total cost of the Project. A public notice and order was issued fixing this charge. It is alleged that under the administration of the Reclamation Act prior to the action of Mead and Wilbur and the orders here complained of, the Reclamation Act was construed, and the contracts made thereunder were construed, as holding that water users were entitled to a sufficient amount of water to beneficially and successfully irrigate their lands; and that it was determined by successive Secretaries that 4.84 feet per annum was necessary for the Fox land, 5.56 feet for the Ottmuller land, and 6 feet for the Parks land, to beneficially and successfully irrigate the same. In accordance with these ascertained facts, Congress passed the Reclamation Extension Act of August 13, 1914, which, among other things, provides: "No increase in the construction charges shall, after August 13, 1914, be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase. 38 Stats. 687, 43 U. S. C. A. 469.

Pursuant to this Act Franklin K. Lane, then Secretary of the Interior on September 24, 1914, issued a public notice and order as follows: "The amount of the construction charge per irrigable acre for lands for which entry under the provisions of the Reclamation Act of June 17, 1902 (32 Stat. 388), where water-right application has heretofore been made, shall be the amount fixed in the several public notices heretofore issued for the respective lands and therein termed 'the building charge', and will not be increased, except as provided in said Reclamation Extension Act." It is alleged in substance that the Sunnyside Irrigation District was organized in 1918, and a contract was entered into with the United States under which the District assumed and agreed to pay construction charges to the extent of $2,000,000 and all obligation and maintenance charges. In pursuance of 43 U. S. C. A., Sec. 512, the Secretary released all liens on the lands of said unit for construction, operation, and maintenance charges.

57 The court below was right in overruling the motions to dismiss the bills of the respective plaintiffs, and the order denying the motions is affirmed.

JOSIAH A. VAN ORSDEL,
Associate Justice.

Dissenting opinion

STEPHENS, Associate Justice, dissenting: In my opinion the United States is a necessary party to these suits; and since it has not consented to be sued, they cannot proceed. Necessary parties are those "affected by the judgment and against which in fact it will operate. . . ." Minnesota v. Hitchcock, 185 U. S. 373, 387. Whether or not title to the water in question is in the United States, the latter is a party to contracts to deliver water. If the asserted reductions made by United States officials in the amounts of water to be delivered under the contracts were illegal, then the United States is bound to

deliver the former amounts. If the reductions are legal, it is not so bound and may therefore, for a consideration valuable to itself, contract for delivery of the difference to the plaintiffs, if they desire it, or to third parties. The point is, in my opinion, controlled by the principle actuating the decisions in: Payne v. Central Pac. Ry. Co., 255 U. S. 228; Northern Pac. Ry. Co. v. North Dakota, 250 U. S. 135; Wells v. Roper, 246 U. S. 335; Lane v. Watts, 234 U. S. 525; United States v. Lee, 106 U. S. 196; Transcontinental & Western Air v. Farley, 71 F. (2d) 288, certiorari denied, 293 U. S. 603. This principle and the application thereof I discussed in my separate opinion in Township of Franklin et al. v. Rexford G. Tugwell et al., decided by this court May 18, 1936, — App. D. C. —, — F. (2d) —. In respect of the situation here involved, I think Wells v. Roper and Transcontinental & Western Air v. Farley are in point and controlling.

58 In United States Court of Appeals

No. 6543, April term, 1936

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLANT

vs.

JACOB F. OTTMULLER

Judgment

June 8, 1936

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the order of the said Supreme Court in this cause be, and the same is hereby, affirmed.

Per Mr. Justice VAN ORSDEL.

JUNE 8, 1936.

Dissenting opinion by Mr. Justice Stephens.

59 Memorandum: Motion to Stay Mandate Filed June 17, 1936.

60 In United States Court of Appeals

[Title omitted.]

Order granting motion to stay mandate

July 6, 1936

On consideration of Appellant's motion for a stay of the mandates herein, under Rule 24, pending application for certiorari to the

Supreme Court of the United States, It is ordered by the Court that the motion be, and it hereby is, granted.

61 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Designation of record

Filed June 23, 1936

The clerk in the preparation of the transcript of record on petition for certiorari to the Supreme Court of the United States will include the following:

1. Printed record.
2. Note of argument.
3. Opinion of the court.
4. Decree.
5. Memorandum of filing motion to stay mandate.
6. Minute entry granting stay of mandate.
7. This designation.
8. Clerk's certificate.

STANLEY REED,
Solicitor General.

[File endorsement omitted.]

62 [Clerk's certificate to foregoing transcript omitted in printing.]

63 Supreme Court of the United States

Order allowing certiorari

Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File Nos. 40806, 40807, 40808. District of Columbia, U. S. Court of Appeals. Term No. 266. Harold L. Ickes, Secretary of the Interior, petitioner, vs. Mazine Z. Fox et al. Term No. 267. Harold L. Ickes, Secretary of the Interior, petitioner, vs. Phillip Louis Parks et al. Term No. 268. Harold L. Ickes, Secretary of the Interior, petitioner, vs. Jacob F. Ottmuller. Petition for writs of certiorari and exhibits thereto. Filed August 7, 1936. Term Nos. 266 O. T. 1936, 267 O. T. 1936, 268 O. T. 1936.

U. S. GOVERNMENT PRINTING OFFICE: 1938